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The USA Patriot Act: A Constitutional Analysis

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THE USA PATRIOT ACT: A CONSTITUTIONAL ANALYSIS

by
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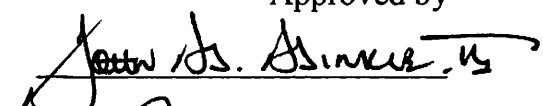
Approved by



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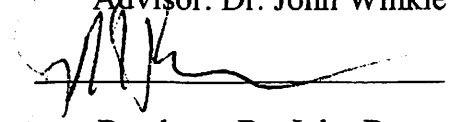

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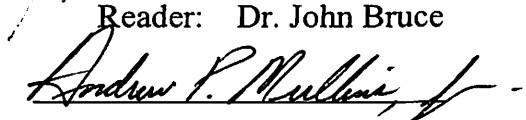

Reader: Dr. Andy Mullins

This work is dedicated to the two heroes of my life, Dean and Catherine Kidd. Their lessons about hard work, and their love, will be with me forever.

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ABSTRACT
DEAN STERLING KIDD: An examination of the USA Patriot Act
(Under the direction of Dr. John Winkle)

This thesis is an examination of various arguments for and against the constitutionality of the USA Patriot Act in regard to the First and Fourth Amendments. The arguments are generally in a framework of competing interests: national security and civil liberties. Specifically, Sections 203, 206, 213, 215, 216, 218, and 505 of the Act are discussed. The analysis of these sections includes their actual language, and commentary from law journal articles. Relevant Supreme Court and lower court cases that relate to national security are also incorporated. The thesis also has a general commentary about the terror attacks which led to the passage of the USA Patriot Act and the reactions by political leaders in the United States after these attacks occurred.

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Chapter 1

THE USA PATRIOT ACT: PROTECTION OR ENCROACHMENT?

Background/Defining the Research Question

The USA Patriot Act was passed in response to the terrorist attacks in New York City and Washington, D. C. on September 11, 2001. The official title of the bill is "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001." This was a major piece of legislation, and passed very quickly in response to a threat the like of which the country had never before faced. In the fervor of an omnipresent civic nationalism, the Patriot Act was largely applauded. However, as time has gone by, certain provisions of the Act have attracted the negative attention of many Constitutional scholars. While this will be discussed in much more detail in the following chapters, it is essential to begin by identifying my research question. The question that I identified at the outset of this project was, "Does the USA Patriot Act violate any principles of the United States Constitution?" As I researched further, I narrowed the question, as it became clear which portions of the Constitution would likely be threatened or weakened by the Act. Therefore, the final question is: "Does the USA Patriot Act exceed the need for enhanced national security by violating the 1st and 4th Amendments to the United States Constitution?"

Defining the 1st and 4th Amendments

Considering the nature of the question, it will be important to define exactly what is stated in the 1st and 4th Amendments, as well any interpretations of their Constitutional meanings by the Supreme Court. The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." This thesis will focus on the freedom of expression aspect of this Amendment. The main potential problem with the Act in regard to the First Amendment relates to the possibility of a chilling effect. It is not hard to notice that a "chilling effect" is not mentioned in the 1st Amendment itself. This is an important point, because the actual meaning and force of the Amendment changes as the Supreme Court issues various rulings. A chilling effect, in most basic terms, refers to any action by government which may cause citizens to suppress their own beliefs for fear of retribution from the government. If a law is ruled to cause this type of reaction without sufficient justification, it is likely to be found unconstitutional. Because some of the provisions increase penalties and monitoring ability, it seems likely they could potentially suppress expression by certain groups. For example, if American Islamic groups that are generally unsupportive of government policies become hesitant to engage in peaceful demonstration, for fear of being labeled terrorist sympathizers, then that could constitute a chilling effect. Possibilities such as the one in this example seem limitless because of the widespread power of this Act and other governmental actions after the attacks. Indeed, unlike the Fourth Amendment issues that will be discussed, the First Amendment issues do not necessarily relate to specific

provisions of the Act. Instead, this issue relates more to the general tenor of the Act. As a result, less time will be spent discussing the First Amendment issues. However, this does not meant this issue can be entirely ignored in this discussion, and that is why I have included it. I will return to this subject in Chapter 3.

The Fourth Amendment to the United States Constitution states: "The right of the people to be secure in their persons, houses, and papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." In her outline of Fourth Amendment doctrine, Jennifer Evans notes that protections provided under this Amendment have not always been applicable to "domestic and foreign intelligence gathering."[1] Evans goes on to provide a very useful framework for considering the Fourth Amendment, and its interpretation by the Supreme Court. As she notes, there have been shifts in doctrine over the years.[2] This point is echoed by Susan Herman. She points out that the Court, especially more recently, has weakened the power of the Fourth Amendment, saying:

> Fourth Amendment doctrine itself has created the loopholes within with the Patriot Act operates. Since the end of the Warren Court era, The Supreme Court has paid little more than lip service to Fourth Amendment precepts, generating myriad exceptions and exclusions[3].

Between the two articles, they make an important, related point: Supreme Court decisions change the meaning of Amendments over time. One important extension of the Fourth Amendment's protections occurred in 1967, when the Court ruled that these should be

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[1] Evans, Jennifer. "Hijacking Civil Liberties: The USA Patriot Act of 2001." *Loyola University Chicago Law Journal* 33 (Summer 2002): 933-990.

[2] 936-947. She discusses various aspects of Supreme Court doctrine.

[3] Herman, Susan. "The USA Patriot Act and the Submajoritarian Fourth Amendment." *Harvard Civil Rights-Civil Liberties Law Review* 41 (Winter 2006): 67-132. See page 71.

extended to electronic surveillance of citizens.[4] Because of this extension, and others, there are numerous possible Constitutional problems in regard to the Fourth Amendment. These problems will dominate much of the discussion, as they are much more specific than the First Amendment concerns. Again, these will be outlined more clearly in Chapter 3.

Civil Liberties vs. Security

The question examined in this thesis is so important because of the debate in society about the relationship between security and civil liberties. I am far from being the only person to notice the tensions involved with this Act, and the United States' war on terror in general. Lee Epstein and Thomas G. Walker note:

> The government claims that it cannot effectively secure the safety of Americans without having great latitude to investigate and prevent terrorist activities. Advocates of civil liberties, however, argue that the government has gone too far, that is has excessively circumnavigated American's basic civil liberties beyond what is necessary to combat terrorism.[5]

This is an excellent summation of the problem this thesis strives to explore, and it is an age-old question. The debate over civil liberties and national security was in full fling when the Constitutional Convention began its work in 1787. As reported by Epstein and Walker, "the delegates considered specific individual guarantees on at least four separate occasions."[6] The authors also describe in some detail the battle between Anti-Federalists (opposing the Constitution without a Bill of Rights) and the Federalists (favoring ratification).[7]

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[4] Jordan, David Allen. "Decrypting the Fourth Amendment: Warrantless NSA Surveillance and the Enhanced Expectation of the Privacy Provided by Encrypted Voice over Internet Protocol." *Boston College Law Review* 47 (May 2006): 505-546. See page 515.

[5] Epstein, Lee and Thomas G. Walker. Constitutional Law for a Changing America: Rights, Liberties, and Justice. 5th Ed. (Washington, D. C.: Congressional Quarterly Press, 2004). See page 541.

[6] See page 5.

Indeed, as discussed above, the idea of individual freedoms has been very important from the very founding of this nation. This is an obvious point as this country achieved its freedom because the colonists felt they were being overwhelmed by a despot. However, it has also been clear from the beginning that such freedoms must not be absolute. Indeed, even the colonists fighting for their freedom were very distrustful of British loyalists. Loyalists were often ostracized, and sometimes even attacked. Therefore, even in the early hours of this fine democracy, before the Constitution was even written, the right of people to express their political beliefs freely was limited. This tradition, especially in time of war, has continued throughout the country's history. However, from a general standpoint, laws are the foundation in a democratic society. At the same time, it is important that the general citizenry recognize those governing as legitimate representatives and further believe that the laws enacted by those governing are justifiable. In fact, as almost anyone who has taken an American history class knows, the Bill of Rights was added to the Constitution in response to the fears of an overbearing central government. However, the discussion must go deeper.

Throughout the current war on terror, the United States, through the leadership of George W. Bush, has tried repeatedly to present itself as a moral beacon to the globe. In fact, shortly after the terrorist attacks, Bush famously referred to the "Axis of Evil." While the three countries implicated in this labeling (North Korea, Iran, and Iraq) had nothing to do directly with the terrorist attacks of 2001, this type of language is emblematic of the United States' current debating style. Therefore, it would be incredibly hypocritical to impose undue limits on the freedom of Americans. The government of this country has

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[7] See pages 4-6.

decided upon a leadership role for this country in the world community. While this is noble, it is imperative to remember that unlike some countries, the United States has a freely operating press. Therefore, if the government attempts to overwhelm individual freedoms while promoting the ideas of freedom and liberty worldwide, it will undoubtedly harm the country's power on the world stage. However, the real problem is that the fundamental rights of individual citizens may be harmed. The answer as to whether the government is encroaching too far into citizen's personal liberty is not concrete, but with an intense study of specific provisions of the Patriot Act, I will strive to determine which side is correct in the current debate. In examining this question, my thesis continues the age-old tradition of the leaders of this country.

Innocent people are routinely sent to jail in the United States. The advent of DNA evidence has even cleared people who were sitting on death row. This point relates to the discussion for a very simple reason: if a suspected terrorist is sent to jail, they are unlikely to have lots of people clamoring to defend them. While the United States is a long-standing democracy, there have been atrocities committed by the government in the name of national defense. Even more disturbing, many of these have occurred in the last century. The internment of Japanese-Americans during World War II is an excellent and disgusting example. Another time which can be cited as a revolting invasion into people's individual freedom occurred during the Red Scare. During this time, Senator Joseph McCarthy was given free reign to harass people, and ruined the lives of many innocent people. From these examples, it is obvious that the government is capable of overstepping its proper boundaries when the security of the country is threatened. People certainly need to feel safe from undue foreign danger. However, this security will mean little if citizens have to fear

their own government. Importantly for this discussion, the government has already proven to be overzealous in the war against terror, prosecuting an innocent citizen. Although the government recognized its wrong, such mistakes cannot continue.

The Role of the Courts

It is important to remember who will decide which of the competing values of individual liberty and security will prevail. As hinted at previously, the federal judiciary will play a large role in deciding whether the Patriot Act is an appropriate use of governmental influence. Speculation about the possible rulings, as well as rulings that have already been handed down, will be discussed later. However, the important thing to note is the power of a relative few in deciding the status of this legislation. Under the form of government in the United States, it will not be the people at large that decide whether or not the Act will stand, but federal judges throughout the country. This will occur through the process of judicial review. Judicial review is the process whereby the courts examine laws to determine whether or not they fit within the framework of the Constitution. In this, the judicial branch could be considered to be a guardian of the rights of citizens. The reasoning behind this idea is not complicated. Very rarely are there instances of legislative bodies granting citizens too many individual rights. Another issue is the idea that legislators sometimes get caught up in the tide of public opinion, and do not pay attention to the Constitution when passing legislation. Article III federal judges are expected to be exempt from the pressures of public opinion, since they do not have to face re-election and serve lifetime appointments. Therefore, these judges stand as a safeguard to ensure that the law of the land is upheld.

Under the theory of democracy, the people have already spoken, through their

legislators. However, it is important to remember that few Americans monitor the legislative process closely. Even when they do, they most often get their information secondhand, through some sort of media. Obviously, as complaints about the Act arise, litigation will be the likely venue to express dissatisfaction. This is an important point; the debate about the Act's constitutionality is moot if nobody takes action in the court system. It would be possible for demonstrators to protest outside Congressional meetings, but this is a highly ineffective way to affect public policy. As has happened in earlier Constitutional debates, it seems likely that groups such as the ACLU will provide the backing for such suits. The average citizen does not have the resources to pursue such an issue financially, nor do they have the time. Such cases will begin at lower levels, and a select few such cases have taken place in regard to the Patriot Act. However, rulings that come from lower courts do not have the force of law nationwide, and lower courts in different regions sometimes produce conflicting rulings on the same issue. However, once such differences arise, the likelihood of a higher power in the system clarifying which ruling to abide by increases. Ultimately, the final decisions will be made by the United States Supreme Court.

Defining Terrorism

The discussion for this thesis is one that is extremely timely considering the state the world community finds itself in today. The USA Patriot Act, as mentioned previously, was designed to combat terrorism. Therefore, it is important to have some discussion about what terrorism actually is. To begin with, it is certainly noted as a threat by many countries: "International terrorism is often cited by world leaders as the greatest threat to Western

democracies, a claim made both before and after September 11." [8] It is defined by *Merriam Webster* as, "The systematic use of terror especially as a means of coercion."[9] Unfortunately, this definition is not very useful. In noting the difficulty of obtaining a solid terminology for terrorism, Young states: "Notwithstanding the great concern about terrorism, it is most often said that no universally (or even widely) accepted definition of terrorism exists at international law."[10] Since this article refers to international law, it may seem inappropriate to include such discussion in this paper. However, it seems important that there be some sort of international consensus about such an important word, especially since the United States will undoubtedly need help from other countries to fully enforce the Patriot Act. Young thus discusses how an international definition of terrorism is needed, and how he believes one could be created.[11] In a related vein, in November 2006 a federal judge in California, Audrey B. Collins, ruled against President Bush's ability to designate certain groups as terrorist organizations.[12] This case will be discussed in a more detailed fashion in Chapter 4. Perhaps the best definition comes under the more general word terror, also from *Merriam Webster*: "violent or destructive acts (as bombing) committed by groups in order to intimidate a population or government into granting their demands."[13]

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[8] Young, Reuven. "Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation." *Boston College International and Comparative Law Review* 29 (Winter 2006): 23-103. See page 24.

[9] "Definition of terrorism." Merriam Webster Online Dictionary. <http://209.161.33.50/dictionary/terrorism>.

[10] See page 24

[11] There is no specific page here; this is what the entirety of the article discusses. Young takes a lengthy approach to trying to define terrorism. He notes four different state definitions of terrorism, and ponders the possibility of using these as a basis for a definition of terrorism. He also discusses the history of terrorism and how the actions of terrorism have changed over time. This, undoubtedly, contributes to the confusion found in the lack of an accepted definition.

[12] Seper, Jerry. "Federal judge rules Bush executive order invalid; Authority lacking to ID 'specially designated global terrorists.'" The Washington Times 30 Nov. 2006, Nation A03.

[13] "Definition of terror." Merriam Webster Online Dictionary. <http://209.161.33.50/dictionary/terror>.

However, once again, this is far too broad a definition to be meaningful in enforcing any kind of law.

In addition to terrorism in general, the discussion must also involve the type of terror faced in the attacks of September 11th. As Young notes in his article, today's terrorism is more dangerous because "it comes from a mix of religious affiliation intertwined with political ideology and geo-political goals."[14] Indeed, as outlined by Jennifer Evans, there have been many attacks involving the interests of the United States since the early 1990s.[15] However, most Americans do not need to read an article to be aware of this development. After the attacks, a highly religious group named Al-Qaeda took responsibility for the attacks on the Twin Towers. Jihad is the main basis for this type of action, and the attackers champion it as a legitimate expression of their religion. Jihad is defined by *Meriam Webster* as "a holy war waged on behalf of Islam as a religious duty."[16] As suggested by this definition, and as has been expressed in the press and media many times since the attacks, the terrorists involved in suicide attacks such as these are

> accompanied by statements stepped in religious motivations. Usually they call for a jihad against the Great Satan, as the late Ayatollah Ruhollah Khomeini of Iran dubbed America in 1979 ...Bin Laden's Oct. 7 statement was similarly laced with religious justifications for killing Americans[17].

Because of this, it is obvious that security and intelligence are important, since normal measures of resistance seem unlikely to dissuade such zealots. On the other hand, it is

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[14] See page 28

[15] In her article, Evans references attacks on the World Trade Center in 2003, the Oklahoma City bombings, the USS Cole, and the September 11 attacks, among others. As she notes, these are "only a sample" of these types of attacks. While it is true they do not all involve Islamic fervor, a solid majority of them do.

[16] "Definition of jihad." Merriam Webster Online Dictionary. <http://209.161.33.50/dictionary/jihad>.

[17] Cooper, Mary H. "Hating America." CQ Researcher 11.41 (2001): 969-992. CQ Researcher Online. CQ Press. J. D. Williams Library University, MS. 8 Feb 2007 <http://0-library.cqpress.com.umiss.lib.olemised u:80/cqre searcher/cqresrre2001112300>.

important to ensure that law enforcement does not grow overzealous in encroaching on the rights of Americans. It is also essential that the rights of Americans who choose to practice Islam are equally protected, and not especially scrutinized because they share religious affiliation with the attackers of September 11th. This point relates to the earlier concern for balance between civil liberties and security.

The importance of this discussion is only likely to grow in the coming years. Terrorism has had several points in history in which it became a favored mode of attack, but today's terrorists seem more persistent. In fact, even though the United States has managed to kill several terrorist leaders in the past few years, it has not deterred their effort. As briefly addressed previously, these terrorists have little incentive to quit, since they are not seeking only worldly goals. Today's terrorism is unlike any threat the country has faced before. The Japanese had suicide pilots in World War II, but the enemy in this war has a seemingly unlimited supply of individuals willing to take their lives for the cause. In addition, there are no clear borders in this war, as the past few years have made clear. In previous engagements, the threat of nuclear war has moderated the discussion. However, terrorists embrace nuclear weapons as just another means to an end. If the United States actually wanted to use a nuclear attack on Al-Qaeda, there would be no clear target. The point being made is that this is a war with no end in sight, unlike many others. Because of this fact, any unlawful intrusion into civil liberties is likely to be a long-term situation, rather than the relatively brief violations of the past. Therefore, it is imperative that the United States ensure the responses being undertaken find the correct balance between all the concerns. The stakes are incredibly high. It takes only one successful terrorist attack to kill many innocent people, and create a general culture of fear. This was dramatically

illuminated in 2001. Although Americans made a generally brave response, much of the country was full of trepidation, and some still are today. Therefore, it is clearly important that the government provide meaningful tools to fight this threat, which will likely be a part of daily life for some time to come. However, as suggested above, the government also must be careful not to violate the United States Constitution in fighting this threat.

Research Methods

For the research underlying this study, I used a qualitative approach. It should be fairly obvious why I did so, as quantitative studies would not be all that useful is an examination of Constitutional issues such as this one. In fact, I am unaware of any statistics that would be useful in conducting a study of this type. If anything, it might be enlightening to see how the majority of Americans feel about the Act. However, this is clearly not enough information to base an entire thesis upon. On the other hand, there are countless law journals and court cases related to this subject. In addition, while the citizenry's opinions are important because of reasons already mentioned, such as support of the system, few Americans are Constitutional scholars. Nor are they on the edge of revolt because of one law. Therefore, it is far more rational to rely on individuals who have knowledge of the issue at hand. Another reason I have chosen the qualitative approach is simple: it will likely be this type of reasoning that ultimately determines the Act's standing in the real world. Barring a Constitutional amendment overturning the Patriot Act, which is incredibly unlikely, the majority of Americans will not be consulted on the deciding vote. Considering the percentage of the country that votes in the modern era, even if this issue were posted on the ballot, a majority of Americans would not decide. As already discussed,

the far more likely outcome is for the Supreme Court to decide. In doing so, it seems unlikely that statistical analyses will play a major role, except for statistics about how many Americans have been affected by the Act. I am unaware of any Court opinion in relation to national security that hinged on statistics that were presented to the Court.

I will be using many law journal articles as references in this paper. The specific number is close to ten. While this may seem a small number, it is because I have chosen the best articles, as well as a collection of recent ones. Many authors found the same problems in the Act, and it is therefore foolish, as well as not feasible to include thoughts from thousands of law journals when a smaller number is sufficient. It is from these articles that I have learned much about the potential defects of the USA Patriot Act. While this interest was sparked by news coverage, this coverage did not contain the hardcore Constitutional information I needed. However, I will rely on some news reports to discuss rulings on the Act, as well as more general information about the Act, and the war on terror. I have also relied on the Act itself, as well as its reauthorizations. In researching this legislation, I encountered some difficulties in understanding exactly what some of the Sections actually did, which helps to explain why the law journals were so useful. It was worthwhile to study these bills, though, because it demonstrated to me how tricky it would likely be for the average American to understand exactly what the law does. I also will rely on many court cases from the past which relate to the balance of national security and civil liberties. I chose this approach because the Patriot Act has, to date, received very little action in the courts. While I will obviously discuss instances where the Act has indeed appeared in Court, it is not even minimally conclusive about the fate of the Act at large. On the other hand, because of the principles of precedent and *stare decisis*, these Court cases from the

past could potentially help make a meaningful prediction about future cases.

Set-up of the Thesis

I have already hinted at the setup of this discussion several times, but I will lay it out formally here. Chapter 2 will take a more in-depth look at the Act itself, and discuss what exactly it does. For this, I will rely strongly on the law journals. Chapter 3 will take an in-depth look at the strongest Constitutional issues posed by the Act. Again, much of the information found in this Chapter will come from law journals. Because of this, much of Chapter 3 will be critical of the Act. Some journals argue more stringently than others, but almost all find some defects with the Act. Chapter 4 will look at Court actions, both on this legislation, and past actions in relation to national security. The reason for this set-up may seem strange, but is really rather elementary once the facts are considered. The journals that the information in Chapter 3 comes from are written by scholars of constitutional law. They are trained to find flaws. Therefore, Chapter 4 will partly attempt to balance the argument with a presentation of previous exceptions allowed by the Court in the name of national security. It will also be important to consider cases related to the war on terrorism, since they are linked to the Patriot Act because of their intent. Furthermore, many of these cases are much timelier than other rulings related to national security. In addition, the Chapter will include discussion on the very limited rulings related to the Act itself. Finally, in Chapter 5 I will analyze the findings. I will provide my opinion about the findings of the research. In other words, I will state whether I believe those arguing for civil liberties or those arguing for security have the strongest case in regard to the Patriot Act. Chapter 5 will also attempt to predict the future actions from the third branch.

Chapter 2

A CLOSER LOOK AT THE USA PATRIOT ACT

The Attacks

The Patriot Act was passed at a crucial juncture in American history. As discussed in Chapter 1, the United States had never faced a threat of this magnitude, with the possible exception of Pearl Harbor. However, Pearl Harbor was an attack on the United States waged by another country. The perpetrators of the terrorist attacks were, and are, much harder to track down than a sovereign nation. The terror of September 11th began when a commercial airliner crashed into the World Trade Center in New York City. At first, many thought the initial crash was an accident. However, after another plane came into the second of the Twin Towers, it became vividly clear that there was no accident. Two more planes would go down that morning, one crashing into the Pentagon and another in a field in Pennsylvania. The one that crashed into the field was widely believed to have been intended for the White House. Shortly after the attacks, a terrorist organization known as al-Qaeda claimed responsibility. In particular, the leader of this group, Osama bin Laden, was very vocal about a new war against America.

The country was in complete shock, and public officials were not exempt from this feeling. Perhaps the best summation of feelings in America at the time is found in a passage from the *Christian Science Monitor* "There's been a lot of crying in America indeed, the world-the past six days. Seldom in human history have the tragedies of a few

hours' time created so many spontaneous communities of comfort."[18] Representative Eric Cantor remarked "'I couldn't believe we were under that kind of threat.'"[19] However, it did not take long for the President and other leaders to make strongly worded statements about the resolve of the country to respond. On September 12th, President Bush stated "'These acts of mass murder were intended to frighten our nation into chaos and retreat, but they have failed.'"[20] Secretary of Defense Donald Rumsfield did not wait to take action. *The Christian Science Monitor Report* reported that "He ran to the scene [at the Pentagon] and helped load some of the injured onto stretchers before a security detail shooed him away."[21] Indeed, only three days after the attack, *The Christian Science Monitor* reported that, "it seems increasingly likely that the United States will retaliate with force... President Bush, the commander-in-chief talks of 'heinous' acts of war that must be responded to, and he vows to 'conquer' the enemy."[22] From this report alone, the memories of the aftermath of the terror attacks come flooding back in vivid detail. The report was also very correct, as the United States would soon be militarily engaged in the Middle Eastern nation of Afghanistan. As has already been mentioned, the perpetrators were not military representatives of a specific country, but the regime in Afghanistan, known as the Taliban, was known to protect al-Qaeda, and bin Laden was believed to be

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[18] Grier, Peter, et al. "A CHANGED WORLD." Christian Science Monitor 93.205 (2001): 1. Newspaper Source. 9 February 2007. <http://search.ebscohost.com>. See page 2. For a summation of all that happened on September 11th and the days following, there is probably no better article.

[19] Grier. See page 6.

[20] Schmemann, Serge. "U.S. Attacked; President Vows to Exact Punishment for 'Evil'" The New York Times Section A, Column 4, Pg. 1. Late Ed. Sep. 12, 2001. 3 Jan. 2007 < http://0-web.lexis-nexis.com.umiss.lib.olemiss.edu/>.

[21] Grier. See page 5.

[22] Knickerbocker, Brad. "US Possesses a Large 'Hammer', but How to Wield It?" "US possesses a large 'hammer,' but how to wield it?" Christian Science Monitor 93.204 (2001): 2. Newspaper Source. 9 Feb. 2007. <http://search.ebscohost.com>. It is not imperative that readers review the entire article, because it is largely a discussion of the overall possible military strategy. However, it is useful in the sense that it captures very well the attitude in the country at the time.

hiding in the caves of this nation. Bin Laden has still not been located, but the search continues on to this day. The Bush administration also made at least some effort to build international consensus: "The US is reaching out to friend and foe alike as it seeks to build an international coalition to fight the scourge of terrorism."[23]

By identifying the attacks as parts of a war, Bush ensured that he would be the leader in determining the appropriate form of response, since the government is given greater powers in times of war. This phenomenon has been proved throughout the country's history, such as with the internment of Japanese citizens. Another example, and probably the most dramatic, is the use of the military draft in previous long-term engagements. Indeed, it would not be long after September 11th before the Bush administration went to work, with Attorney General John Ashcroft providing a draft of a bill intended to strengthen the ability of the United States to respond to terrorism. Although the Congress did not give Bush all the power he requested, this administration draft would become the framework for the USA Patriot Act. As reported by the Congressional Research Service, "It [The Patriot Act] flows from a consultation draft circulated by the Department of Justice, to which Congress made substantial modifications and additions."[24] The last point is an important point to remember; the Patriot Act was a collaborative effort between the executive branch and the legislative branch. Because the Congress made its own modifications after debate, the separation of powers doctrine was in full force in the passing of this Act. As will be discussed later, this Act has faced and will likely continue to face action from the third branch.

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[23] LaFranchi, Howard, and Ann Scott Tyson. "A New World Order? (Cover story)." Christian Science Monitor 93.204 (2001): 1. Newspaper Source. 11 Jan. 2007. http://search.ebscohost.com. See page 1.
[24] Doyle, Charles. "The USA Patriot Act: A Legal Analysis" Congressional Resource Service The Library of Congress. 15 April 2002 Order Code RL31377. 1-75. See Summary page.

Passing the Patriot Act into Law

The Patriot Act, as mentioned in Chapter 1, was passed as H. R. 3162. However, simply commenting on this does not come close to capturing the complexities of getting both houses of Congress to pass the bill. As with any other legislation, the Act had to be passed by both the Senate and the House of Representatives, and their versions of the bill had to agree. According to the summary in Charles Doyle's analysis, the bill had to go through several versions before it was able to accomplish this threshold, beginning as the PATRIOT Act in the House and the USA Act in the Senate.[25] The Senate was the first to act, as S. 1510 was passed on October 11, 2001, by a vote of 96-1, without amendment.[26] Interestingly, the bill had support from both sides of the aisle: the primary sponsor was Democrat Tom Daschle, and the 25 co-sponsors ranged from Trent Lott of Mississippi (a Republican) to Hillary Rodham Clinton of New York (a Democrat).[27] The House acted the same day, with its Judiciary Committee reporting out an amended version of the initial anti-terror legislation proposal that had been presented by the Attorney General.[28] The following day, the House passed H. R. 2975, by a vote of 337-79.[29] As in the Senate, the bill had bipartisan support, with Republican James Sensenbrenner serving as the sponsor, with 26 co-sponsors, including Democrats such as Robert Wexler and Sheila Jackson-Lee.[30] The House version of the bill did not initially match up with the version passed by the Senate. This is not an uncommon occurrence, as it is difficult to get two

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[25] See page 1.
[26] The Library of Congress. Thomas.<http://thomas.loc.gov/cgi-bin/bdquery/z?d107:SN01510:>
[27] The Library of Congress. Thomas.<http://thomas.loc.gov/cgi-bin/bdquery/z?d107:SN01510:>
[28] Doyle, Charles. See page 1.
[29] The Library of Congress. Thomas. <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR02975:>
[30] The Library of Congress. Thomas. <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR02975:>

completely separate legislative bodies to pass identical bills. However, in the system in the United States, the versions of the bill must be reconciled before being sent to the President. Rather than having a conference committee, on October 24th, the House, by a vote of 357-66, passed H. R. 3162, which resolved the differences between the House and Senate bills.[31] Sensenbrenner, who was Chair of the House Judiciary Committee, said the legislation was '"vitally needed...to get the intelligence necessary to protect the people of the United States of America from whatever the enemy has up its sleeve."'[32] In this declaration, Sensenbrenner purposefully emphasized the need for a stronger national security. In contrast, the Representatives in opposition were very disturbed with the process used to pass the legislation: Barney Frank, a Democrat, said "This bill, ironically, which has been given all of these high-flying acronyms...has been debated in the most undemocratic way possible."[33] The Senate, by a vote of 98-1, passed the same bill without amendment on October 25th, and it was sent to President.[34] Tom Daschle, in his remarks, was not quite as emphatic: "This has not been easy...We were able to find what I think is the appropriate balance between protecting civil liberties and privacy, and ensuring that law enforcement has the tools that it needs to the job it must."[35] Therefore, for such a wide-reaching bill, this legislation passed relatively quickly, as it was signed into law by President Bush on October 26, 2001, becoming Public Law 107-56.[36] The Act does many different things, and much of it is beyond the scope and concern of this

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[31] The Library of Congress. Thomas. <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR03162:> (1 p).
[32] Kuhnhenn, James. "House Passes Counter-Terrorism Bill." Knight Ridder Tribune Washington Bureau (DC). Newspaper Source Oct. 25, 2001. 11 Jan. 2007 <http://search.ebscohost.com>. See page 1.
[33] Kuhnhenn, James. "House Passes Counter-Terrorism Bill." See page 1.
[34] The Library of Congress. Thomas. <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR03162:@@@X>
[35] Kuhnhenn, James. "Senate Approves Counter-Terrorism Bill." October 26, 2001 Knight Ridder Tribune Washington Bureau (DC) . Newspaper Source. 11 February 2007. <http://search.ebscohost.com>. See page 2.
[36] Doyle, Charles. See page 2.

thesis. However, because of the nature of the research question, it is important to review the bill as a whole. In so doing, an important point will be made from the outset. This thesis examines only certain provisions at an in-depth level. Many portions of the Act do not raise Constitutional questions. However, the purpose of the next section is to provide information about the Act as a whole.

The Provisions of the Act

The Act begins with Section 1, which includes the short title and the table of contents. It is a very short portion of the legislation, and the real meat of the bill is found in the various Titles.

Title I of the Act is entitled, "Enhancing Domestic Security against Terrorism." Title I is the shortest of the all the titles. One of the most significant Sections in this Title is found in the Congressional condemnation of discrimination against Arab and Muslim Americans.[37] This had to be included because of the xenophobia that existed after the attacks, with Americans feeling great hatred and fear in regard to Islam.

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[37] SEC. 102. SENSE OF CONGRESS CONDEMNING DISCRIMINATIONAGAINST ARAB AND MUSLIM AMERICANS.(a) FINDINGS.—Congress makes the following findings:(1) Arab Americans, Muslim Americans, and Americansfrom South Asia play a vital role in our Nation and are entitled to nothing less than the full rights of every American.(2) The acts of violence that have been taken against Arab and Muslim Americans since the September 11, 2001, attacks against the United States should be and are condemned by all Americans who value freedom. (3) The concept of individual responsibility for wrongdoing is sacrosanct in American society, and applies equally to all religious, racial, and ethnic groups.(4) When American citizens commit acts of violence against those who are, or are perceived to be, of Arab or Muslim descent, they should be punished to the full extent of the law. (5) Muslim Americans have become so fearful of harassment that many Muslim women are changing the way they dress to avoid becoming targets.(6) Many Arab Americans and Muslim Americans have acted heroically during the attacks on the United States, including Mohammed Salman Hamdani, a 23-year-old New Yorker of Pakistani descent, who is believed to have gone to the World Trade Center to offer rescue assistance and is now missing.(b) SENSE OF CONGRESS.—It is the sense of Congress that—(1) the civil rights and civil liberties of all Americans,including Arab Americans, Muslim Americans, and Americans from South Asia, must be protected, and that every effort must be taken to preserve their safety; (2) any acts of violence or discrimination against any Americans be condemned; and (3) the Nation is called upon to recognize the patriotism of fellow citizens from all ethnic, racial, and religious backgrounds.

Title II, entitled "Enhanced Surveillance Procedures" is where most of the Constitutional questions to be discussed in Chapter 3 arise. Therefore, I will save my commentary regarding this Title for that Chapter.

Title III, entitled "International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001" deals with what it sounds like, terrorist financing. Title III is extremely long, with three Subtitles, and takes numerous steps to try to limit the resources of terrorists. Some of the measures undertaken include attempting to deter money laundering through cooperation between financial institutions and government,[38] requiring brokers to report suspicious activity,[39] and working with foreign governments to identify the originators of wire transfers.[40]

Title IV is entitled, "Protecting the Border," and has three subtitles. These Subtitles, are, in order, "Protecting the Northern Border," "Enhanced Immigration Provisions," and "Preservation of Immigration Benefits for Victims of Terrorism." Subtitle A attempts to address the problem of inadequate security personnel on the border shared with Canada. Subtitle B strives to strengthen the security in the immigration process, including increasing monitoring of foreign students[41] and strengthening vigilance against possible passport tampering.[42] Subtitle C deals with immigrants whose status was affected by the terrorist attacks, ranging from those who were killed in the attacks[43] to those who missed deadlines on paperwork as a result of the attacks.[44]

Title V is named "Removing Obstacles to Investigating Terrorism." This Title

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[38] Section 314
[39] Section 356
[40] Section 330
[41] Section 416
[42] Section 417
[43] Section 423
[44] Section 425

contains one of the Sections that will be discussed in Chapter 3 as a possible Constitutional problem. In addition to that Section, the Title deals mainly with the ability of the government to pay rewards,[45] and disclosure of certain records.[46]

Title VI is identified as "Providing for Victims of Terrorism, Public Safety Families of Public Safety Officers" and "Subtitle B—Amendments to the Victims of Crime Act of 1984." This Title needs very little explanation, because the wording in its name and the names of the subtitles captures very well its purpose.

Title VII, "Increased Information Sharing for Critical Infrastructure Protection", contains only one section, and it is meant to increase the communication between levels of government.

Title VIII is called "Strengthening the Criminal Laws against Terrorism." This Title includes two definitions.[47] Also, as suggested by the wording above, this Title seeks to provide a deterrent against future attacks by, among other things, providing that certain

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[45] Sections 501 and 502 deal with the Attorney General's authority to pay rewards to combat terrorism, and with the Secretary of State's authority to do the same

[46] Sections 507 and 508 deal with the disclosure of education records and information from NCES surveys, respectively.

[47] SEC. 802. DEFINITION OF DOMESTIC TERRORISM.(a) DOMESTIC TERRORISM DEFINED.—Section 2331 of title 18, United States Code, is amended—(1) in paragraph (1)(B)(iii), by striking ''by assassination or kidnapping'' and inserting ''by mass destruction, assassination, or kidnapping''; (2) in paragraph (3), by striking ''and''; (3) in paragraph (4), by striking the period at the end and inserting ''; and''; and (4) by adding at the end the following: ''(5) the term 'domestic terrorism' means activities that— ''(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; ''(B) appear to be intended—''(i) to intimidate or coerce a civilian population; ''(ii) to influence the policy of a government by intimidation or coercion; or ''(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and ''(C) occur primarily within the territorial jurisdiction of the United States.''. (b) CONFORMING AMENDMENT.—Section 3077(1) of title 18, United States Code, is amended to read as follows: ''(1) 'act of terrorism' means an act of domestic or international terrorism as defined in section 2331;''.
SEC. 808. DEFINITION OF FEDERAL CRIME OF TERRORISM. Section 2332b of title 18, United States Code, is amended—(1) in subsection (f), by inserting ''and any violation of section 351(e), 844(e), 844(f)(1), 956(b), 1361, 1366(b), 1366(c), 1751(e), 2152, or 2156 of this title,'' before ''and the Secretary''; and (2) in subsection (g)(5)(B), by striking clauses (i) through (iii) and inserting the following: ''(i) section 32 (relating to destruction of aircraft or aircraft facilities), 37 (relating to violence at international airports), 81 (relating to arson within special maritime and territorial jurisdiction), 175 or 175b

acts of terrorism will have no statute of limitations on punishment[48] being brought.

Title IX, named "Improved Intelligence," deals mainly with activities of the Central Intelligence Agency, or the CIA. Specifically, it addresses the responsibilities of the Director of the CIA in regard to the Foreign Intelligence Act of 1978[49]:

> [It]allows for wiretapping of aliens and citizens in the United States when there is probable cause to believe that the target of the wiretap is a member of a foreign terrorist group or an agent of a foreign power...Designed to maintain a balance between national security interests and the privacy interests of United States citizens, FISA requires that a designated government official apply for electronic surveillance warrants.[50]

In addition, disclosure to the Director of information related to foreign intelligence that is gathered in criminal investigations domestically[51] is addressed, and is intended to ensure

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(relating to biological weapons), 229 (relating to chemical weapons), subsection (a), (b), (c), or (d) of section 351 (relating to congressional, cabinet, and Supreme Court assassination and kidnaping), 831 (relating to nuclear materials), 842(m) or (n) (relating to plastic explosives), 844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death), 844(i) (relating to arson and bombing of property used in interstate commerce), 930(c) (relating to killing or attempted killing during an attack on a Federal facility with a dangerous weapon), 956(a)(1)(relating to conspiracy to murder, kidnap, or maim persons abroad), 1030(a)(1) (relating to protection of computers), 1030(a)(5)(A)(i) resulting in damage as defined in 1030(a)(5)(B)(ii) through (v) (relating to protection of computers), 1114 (relating to killing or attempted killing of officers and employees of the United States), 1116 (relating to murder or manslaughter of foreign officials, official guests, or internationally protected persons), 1203 (relating to hostage taking), 1362 (relating to destruction of communication lines, stations, or systems), 1363 (relating to injury to buildings or property within special maritime and territorial jurisdiction of the United States), 1366(a) (relating to destruction of an energy facility), 1751(a), (b), (c), or (d) (relating to Presidential and Presidential staff assassination and kidnaping), 1992 (relating to wrecking trains), 1993 (relating to terrorist attacks and other acts of violence against mass transportation systems), 2155 (relating to destruction of national defense materials, premises, or utilities), 2280 (relating to violence against maritime navigation), 2281 (relating to violence against maritime fixed platforms), 2332 (relating to certain homicides and other violence against United States nationals occurring outside of the United States), 2332a (relating to use of weapons of mass destruction), 2332b (relating to acts of terrorism transcending national boundaries), 2339 (relating to harboring terrorists), 2339A (relating to providing material support to terrorists), 2339B (relating to providing material support to terrorist organizations), or 2340A (relating to torture) of this title; ''(ii) section 236 (relating to sabotage of nuclear facilities or fuel) of the Atomic Energy Act of 1954 (42 U.S.C. 2284); or ''(iii) section 46502 (relating to aircraft piracy), the second sentence of section 46504 (relating to assault on a flight crew with a dangerous weapon), section 46505(b)(3) or (c) (relating to explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft), section 46506 if homicide or attempted homicide is involved (relating to application of certain criminal laws to acts on aircraft), or section 60123(b) (relating to destruction of interstate gas or hazardous liquid pipeline facility) of title 49.''.

[48] This is found in Section 809, and refers to crimes that "resulted in, or created a foreseeable risk of, death or serious bodily injury to another person."

[49] Section 901

[50] Evans, Jennifer. See page 955.

the coordination of information from various layers of law enforcement.

As is common in legislation, the final Title, Title X, is "Miscellaneous." As suggested by the name, the contents of this Title do not neatly fit under any other Title. Some of issues addressed by the underlying Sections include Assistance to first responders[52] and critical infrastructures protection.[53]

As can be seen from the information in the preceding pages, this legislation covers a large variety of topics. It is an act that is likely to remain important for a long time. However, some of the provisions were set to sunset, or expire, in 2005. Therefore, the Congress had to hold hearings on the reauthorization of parts of this legislation.

Reauthorizing the Patriot Act

The USA Patriot Act Improvement and Reauthorization Act of 2005 was signed into law by the President on March 9, 2006, becoming P.L. 109-177.[54] As suggested by the date in the name, it took far longer for this to be passed than the sponsors would have liked. In fact, the House and Senate had both passed USA Patriot Act Reauthorization Acts in July 2005. However, it took eight months before the conference report, H. Rept. 109-333, was finally accepted by both houses of Congress. It is important to note that approval was achieved much quicker in the House than the Senate: it was passed in the House on December 14, 2005; March 2, 2006 in the Senate.[55] As evidenced by the timelines, this was a long battle, with many Democratic members of Congress exhibiting steadfast resistance. Obviously, the Senate was the base for the fight. This resistance

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[51] Section 905
[52] Section 1005
[53] Section 1016
[54] The Library of Congress. Thomas. <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR03199:@@@R>.
[55] The Library of Congress. Thomas. <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR03199:@@@R>.

movement was led by Russ Feingold, who is rumored to be a potential Presidential candidate in 2008. According to reports, he exhibited stringent opposition in a "monthslong fight," and had previously "led a successful bipartisan filibuster... demanding additional limits on investigative tools."[56] The additional limits referred to are contained in the additional reauthorizing amendments, which will be discussed later in the Chapter. Feingold provided the rationale for his long fight in a strongly worded statement, remarking '"This fight was about trying to restore the public's trust in our government...the government is willing to trample on the law and constitutional guarantees in the fight against terrorism."'[57] This is an important point, because, as alluded to previously, there were no such holdups of the process in 2001. In fact, although some Democratic Senators were reticent to support the initial legislation, Feingold was the only Senator to actually vote against it. The change in course represents the idea of some that the Act had gone too far, and their determination to stop it from continuing to do so. However, the Act still received strong support from some in the Senate: upon passage of the bill, Senate Majority Leader Bill Frist remarked "Today, we are making a statement that we cannot return to the pre-9/11 structure that could cost innocent Americans their lives."[58] In the end, the bill still passed by the substantial margin of 89-10.[59] As mentioned previously, the debate in the House did not take as long. The bill passed the House by a vote of 251-174. Therefore, since the reauthorization passed, the argument of those in opposition was not an entirely successful one. I use the word entirely, because they certainly did a good job of preventing the legislation from

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[56] Dinan, Stephen. "Patriot Act wins Senate approval." Washington Times, The (DC) . Newspaper Source Mar. 3, 2006. 11 February 2007. <http://search.ebscohost.com>. See page 2
[57] Dinan, Stephen. See page 2.
[58] Dinan, Stephen. See page 1.
[59] The Library of Congress. Thomas. <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR03199:@@@R>.

flying through Congress as quickly as it had in its initial appearance. They also gained some concessions in regard to civil liberties, which will be discussed later.

The Provisions of the Patriot Act Reauthorization

Title I is "USA Patriot Improvement and Reauthorization Act." Obviously, this is the title of the most concern to this study. Some of these Sections deal with the provisions from the initial Act that Constitutional scholars have found the most troubling. As reported by the Congressional Research Service, "Title I postpones expiration of sections 206 and 215 until December 31, 2009 and makes permanent the other USA Patriot Act Amendments."[60] This is an important point, because 206 and 215 will both be addressed in the next Chapter. Several other noteworthy changes[61] were made to Section 215:

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[60] Doyle, Charles and Brian T. Yeh. "USA Patriot Act Improvement and Reauthorization Act of 2005: A Sketch." CRS Report for Congress. Order Code R22412. 28 March 2006. 1-6. See page 1.

[61] SEC. 106. ACCESS TO CERTAIN BUSINESS RECORDS UNDER SECTION 215 OF THE USA PATRIOT ACT.(a) DIRECTOR APPROVAL FOR CERTAIN APPLICATIONS.—Subsection (a) of section 501 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861(a)) is amended— (1) in paragraph (1), by striking ''The Director'' and inserting ''Subject to paragraph (3), the Director''; and (2) by adding at the end the following: ''(3) In the case of an application for an order requiring the production of library circulation records, library patron lists, book sales records, book customer lists, firearms sales records, tax return records, educational records, or medical records containing information that would identify a person, the Director of the Federal Bureau of Investigation may delegate the authority to make such application to either the Deputy Director of the Federal Bureau of Investigation or the Executive Assistant Director for National Security (or any successor position). The Deputy Director or the Executive Assistant Director may not further delegate such authority.''. (b) FACTUAL BASIS FOR REQUESTED ORDER.—Subsection (b)(2) of such section is amended to read as follows: ''(2) shall include—''(A) a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment) conducted in accordance with subsection (a)(2) to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, such things being presumptively relevant to an authorized investigation if the applicant shows in the statement of the facts that they pertain to— ''(i) a foreign power or an agent of a foreign power; ''(ii) the activities of a suspected agent of a foreign power who is the subject of such authorized investigation; or ''(iii) an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation; and ''(B) an enumeration of the minimization procedures adopted by the Attorney General under subsection (g) that are applicable to the retention and dissemination by the Federal Bureau of Investigation of any tangible things to be made available to the Federal Bureau of Investigation

based on the order requested in such application.''. (c) CLARIFICATION OF JUDICIAL DISCRETION.—Subsection (c)(1) of such section is amended to read as follows: ''(c)(1) Upon an application made pursuant to this section, if the judge finds that the application meets the requirements of subsections (a) and (b), the judge shall enter an ex parte order as requested, or as modified, approving the release of tangible things. Such order shall direct that minimization proceduresadopted pursuant to subsection (g) be followed.''. (d) ADDITIONAL PROTECTIONS.—Subsection (c)(2) of such section is amended to read as follows:''(2) An order under this subsection—''(A) shall describe the tangible things that are ordered o be produced with sufficient particularity to permit them to be fairly identified;''(B) shall include the date on which the tangible things must be provided, which shall allow a reasonable period of time within which the tangible things can be assembled and made available; ''(C) shall provide clear and conspicuous notice of the principles and procedures described in subsection (d); ''(D) may only require the production of a tangible thing if such thing can be obtained with a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation or with any other order issued by a court of the United States directing the production of records or tangible things; and ''(E) shall not disclose that such order is issued for purposes of an investigation described in subsection (a).'' (e) PROHIBITION ON DISCLOSURE.—Subsection (d) of such section is amended to read as follows: ''(d)(1) No person shall disclose to any other person that the Federal Bureau of Investigation has sought or obtained tangible things pursuant to an order under this section, other than to—''(A) those persons to whom disclosure is necessary to comply with such order; ''(B) an attorney to obtain legal advice or assistance with respect to the production of things in response to the order; or ''(C) other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director. ''(2)(A) A person to whom disclosure is made pursuant to paragraph (1) shall be subject to the nondisclosure requirements applicable to a person to whom an order is directed under this section in the same manner as such person. ''(B) Any person who discloses to a person described in subparagraph (A), (B), or (C) of paragraph (1) that the Federal Bureau of Investigation has sought or obtained tangible things pursuant to an order under this section shall notify such person of the nondisclosure requirements of this subsection. ''(C) At the request of the Director of the Federal Bureau of Investigation or the designee of the Director, any person making or intending to make a disclosure under this section shall identify to the Director or such designee the person to whom such disclosure will be made or to whom such disclosure was made prior to the request, but in no circumstance shall a person be required to inform the Director or such designee that the person intends to consult an attorney to obtain legal advice or legal assistance.''. (f) JUDICIAL REVIEW.— (1) PETITION REVIEW POOL.—Section 103 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1803) is amended by adding at the end the following new subsection: ''(e)(1) Three judges designated under subsection (a) who reside within 20 miles of the District of Columbia, or, if all of such judges are unavailable, other judges of the court established under subsection (a) as may be designated by the presiding judge of such court, shall comprise a petition review pool which shall have jurisdiction to review petitions filed pursuant to section 501(f)(1). ''(2) Not later than 60 days after the date of the enactment of the USA PATRIOT Improvement and Reauthorization Act of 2005, the court established under subsection (a) shall adopt and, consistent with the protection of national security, publish procedures for the review of petitions filed pursuant to section 501(f)(1) by the panel established under paragraph (1). Such procedures shall provide that review of a petition shall be conducted in camera and shall also provide for the designation of an acting presiding judge.''. (2) PROCEEDINGS.—Section 501 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861) is further amended by adding at the end the following new subsection: ''(f)(1) A person receiving an order to produce any tangible thing under this section may challenge the legality of that order by filing a petition with the pool established by section 103(e)(1).The presiding judge shall immediately assign the petition to one of the judges serving in such pool. Not later than 72 hours after the assignment of such petition, the assigned judge shall conduct an initial review of the petition. If the assigned judge determines that the petition is frivolous, the assigned judge shall immediately deny the petition and affirm the order. If the assigned judge determines the petition is not frivolous, the assigned judge shall promptly consider the petition in accordance with the procedures established pursuant to section 103(e)(2). The judge considering the petition may modify or set aside the order only if the judge finds that the order does not meet the requirements of this section or is otherwise unlawful. If the judge does not modify or set aside the order, the judge shall immediately affirm the order and order the recipient to comply therewith. The assigned judge shall promptly provide a written statement

for the record of the reasons for any determination under this paragraph. ''(2) A petition for review of a decision to affirm, modify, or set aside an order by the United States or any person receiving such order shall be to the court of review established under section 103(b), which shall have jurisdiction to consider such petitions. The court of review shall provide for the record a written statement of the reasons for its decision and, on petition of the United States or any person receiving such order for writ of certiorari, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision. ''(3) Judicial proceedings under this subsection shall be concluded as expeditiously as possible. The record of proceedings, including petitions filed, orders granted, and statements of reasons for decision, shall be maintained under security measures established by the Chief Justice of the United States in consultation with the Attorney General and the Director of National Intelligence. ''(4) All petitions under this subsection shall be filed under seal. In any proceedings under this subsection, the court shall, upon request of the government, review ex parte and in camera any government submission, or portions thereof, which may include classified information.''. (g) MINIMIZATION PROCEDURES AND USE OF INFORMATION.—Section 501 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861) is further amended by adding at the end the ''(g) MINIMIZATION PROCEDURES.—''(1) IN GENERAL.—Not later than 180 days after the date of the enactment of the USA PATRIOT Improvement and Reauthorization Act of 2005, the Attorney General shall adopt specific minimization procedures governing the retention and dissemination by the Federal Bureau of Investigation of any tangible things, or information therein, received by the Federal Bureau of Investigation in response to an order under this title. ''(2) DEFINED.—In this section, the term 'minimization procedures' means— ''(A) specific procedures that are reasonably designed in light of the purpose and technique of an order for the production of tangible things, to minimize the retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;''(B) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in section 101(e)(1), shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance; and''(C) notwithstanding subparagraphs (A) and (B), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes. ''(h) USE OF INFORMATION.—Information acquired from tangible things received by the Federal Bureau of Investigation in response to an order under this title concerning any United States person may be used and disclosed by Federal officers and employees without the consent of the United States person only in accordance with the minimization procedures adopted pursuant to subsection g). No otherwise privileged information acquired from tangible things received by the Federal Bureau of Investigation in accordance with the provisions of this title shall lose its privileged character. No information acquired from tangible things received by the Federal Bureau of Investigation in response to an order under this title may be used or disclosed by Federal officers or employees except for lawful purposes.''. (h) ENHANCED OVERSIGHT.—Section 502 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1862) is amended—(1) in subsection (a)—(A) by striking ''semiannual basis'' and inserting ''annual basis''; and (B) by inserting ''and the Committee on the Judiciary'' after ''and the Select Committee on Intelligence''; (2) in subsection (b)— (A) by striking ''On a semiannual basis'' and all that follows through ''the preceding 6-month period'' and inserting ''In April of each year, the Attorney General shall submit to the House and Senate Committees on the Judiciary and the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence a report setting forth with respect to the preceding calendar year''; (B) in paragraph (1), by striking ''and'' at the end; (C) in paragraph (2), by striking the period at the end and inserting ''; and''; and (D) by adding at the end the following new paragraph: ''(3) the number of such orders either granted, modified, or denied for the production of each of the following: ''(A) Library circulation records, library patron lists, book sales records, or book customer lists. ''(B) Firearms sales records. ''(C) Tax return records. ''(D) Educational records.''(E) Medical records containing information that would identify a person.''; and (3) by adding at the end the following new subsection: ''(c)(1) In April of each year, the Attorney General shall submit to Congress a report setting forth with respect to the preceding year— ''(A) the total number of applications made for orders approving requests for the production of tangible things under section 501; and ''(B) the total number of such orders

> Title I adds several safeguards to the use of Section 215...First, it provides that the FBI Director, Deputy Director, or the Executive Assistant Director for National Security must approve orders for the production of certain records...Title I establishes a judicial review process for recipients of 215 orders to challenge them...Title I expressly clarifies that a recipient of a 215 order may disclose its existence to an attorney to obtain legal advice, as well as to other persons approved by the FBI.[62]

As can be seen both from the preceding analysis, and the extremely comprehensive nature of the legislation included in the footnote, Congress was very concerned with Section 215. These changes certainly made a difference in the way that Section functions. This point is emphasized in the report by Doyle and Yeh, which states:

> Congressional oversight of the use of FISA authority is enhanced...by requiring the Attorney General to report to both Houses' Judiciary and Intelligence Committees concerning FISA order disclosures, electronic surveillance orders, and physical searches. In addition, the Inspector General is instructed to perform a comprehensive audit if the effectiveness and use of the FBI's FISA authority, for submission to the Judiciary and Intelligence Committees for calendar years 2005-2006.[63]

Title I addresses "sneak and peak" warrants, by "permitting notification delays of no more than 30 days, with 90-day extensions as the facts justify; removing undue trial delay as a ground for delayed notification; and requiring annual reports to Congress on the use of this authority."[64] Sneak and peak warrants will be discussed in more detail in Chapter 3. Finally, this Title:

> extends the tenure for both initial and extension orders authorizing installation and use of FISA pen registers and trap and trace surveillance devices from a period of 90 days to one year, in cases in which the government has certified that the information likely to be obtained is foreign intelligence information not concerning a U. S. person.[65]

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either granted, modified, or denied. ''(2) Each report under this subsection shall be submitted in unclassified form.''.

[62] Doyle, Charles and Brian T. Yeh. See page 1.

[63] See page 3.

[64] Doyle, Charles and Brian T. Yeh. See page 4.

[65] Doyle, Charles and Brian T. Yeh. See page 3.

Title II is "Terrorist Death Penalty Enhancement." It is relatively short, but includes two subtitles: "Terrorist penalties enhancement Act" and "Federal Death Penalty Procedures." This Title deals mainly with punishment of terrorists, including their post release supervision.[66] According to Doyle and Yeh, it "makes several adjustments in federal death penalty law" including procedures in "air piracy cases...federal capital drug cases...[and]the appointment of counsel in capital indigent defendant cases."[67]

Title III, "Reducing Crime and Terrorism at America's Seaports," attempts to discourage any type of fraudulent activity at seaports in the country. Among other things, it seeks to prevent the transportation of dangerous materials and terrorists.[68]

Title IV, "Combating Terrorist Financing," needs very little explanation. However, Section 406 does relate directly to the USA Patriot Act, dealing mainly with technical corrections and clarifications.[69]

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[66] Section 212

[67] See pages 4-5.

[68] Section 305

[69] (a) TECHNICAL CORRECTIONS.—(1) Section 322 of Public Law 107–56 is amended by striking ''title 18'' and inserting ''title 28''. (2) Section 1956(b)(3) and (4) of title 18, United States Code, are amended by striking ''described in paragraph (2)'' each time it appears; and (3) Section 981(k) of title 18, United States Code, is amended by striking ''foreign bank'' each time it appears and inserting ''foreign financial institution (as defined in section 984(c)(2)(A) of this title)''. (b) CODIFICATION OF SECTION 316 OF THE USA PATRIOT ACT.— (1) Chapter 46 of title 18, United States Code, is amended— (A) in the chapter analysis, by inserting at the end the following: ''987. Anti-terrorist forfeiture protection.''; and (B) by inserting at the end the following: ''§ 987. Anti-terrorist forfeiture protection ''(a) RIGHT TO CONTEST.—An owner of property that is confiscated under any provision of law relating to the confiscation of assets of suspected international terrorists, may contest that confiscation by filing a claim in the manner set forth in the Federal Rules of Civil Procedure (Supplemental Rules for Certain Admiralty and Maritime Claims), and asserting as an affirmative defense that— ''(1) the property is not subject to confiscation under such provision of law; or ''(2) the innocent owner provisions of section 983(d) of title 18, United States Code, apply to the case. ''(b) EVIDENCE.—In considering a claim filed under this section, a court may admit evidence that is otherwise inadmissible under the Federal Rules of Evidence, if the court determines that the evidence is reliable, and that compliance with the Federal Rules of Evidence may jeopardize the national security interests of the United States. ''(c) CLARIFICATIONS.— ''(1) PROTECTION OF RIGHTS.—The exclusion of certain provisions of Federal law from the definition of the term 'civil forfeiture statute' in section 983(i) of title 18, United States Code, shall not be construed to deny an owner of property the right to contest the confiscation of assets of suspected international terrorists under—''(A) subsection (a) of this section; ''(B) the Constitution; or ''(C) subchapter II of chapter 5 of title 5, United States Code (commonly known as the 'Administrative Procedure Act'). ''(2) SAVINGS CLAUSE.—Nothing in this section shall limit or otherwise affect any other remedies that may be available to an owner of property

Title V, "Miscellaneous Provisions," deals with a variety of issues, including setting the Director of Homeland Security's place in the line of Presidential succession.[70]

Title VI, "Secret Service," focuses partly on the Service's role in dealing with national special security events,[71] and these provisions are the ones most related to the subject at hand.

Title VII, "Combat Methamphetamine Epidemic Act of 2005," has very little relation to the overall tone of this discussion. It seems to be a curious inclusion in an Act focused on terrorism-centered issues, and is only included for the sake of completeness. It includes five subtitles, A-E, but for the reasons just discussed, their word titles will not be all laid out here.

Debating the Additional Reauthorization Amendments

Even after the extensive reauthorization process discussed, the Patriot Act was to undergo another modification. This was signed into law by the President the same day as H. R. 3199, becoming P. L. 109-178.[72] Entitled "USA Patriot Act Additional Reauthorizing Amendments Act of 2006," or S. 2271, it is much shorter than the first reauthorization. However, without this addition, the initial reauthorization likely would not have passed. It was sponsored by a Senator who had previously been critical of the

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under section 983 of title 18, United States Code, or any other provision of law.". (2) Subsections (a), (b), and (c) of section 316 of Public Law 107–56 are repealed. (c) CONFORMING AMENDMENTS CONCERNING CONSPIRACIES.— (1) Section 33(a) of title 18, United States Code is amended by inserting "or conspires" before "to do any of the aforesaid acts". (2) Section 1366(a) of title 18, United States Code, is amended—(A) by striking "attempts" each time it appears and inserting "attempts or conspires"; and (B) by inserting ", or if the object of the conspiracy had been achieved," after "the attempted offense had been completed".

[70] "Section 19(d) (1) of title 23, United States Code, is amended by inserting, "Secretary of Homeland Security" after Secretary of Veterans Affairs."

[71] Sections 602 and 603

[72] The Library of Congress. Thomas. <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN02167:@@@R>.

Patriot Act, John Sununu, with three co-sponsors.[73] Indeed, it is no coincidence that this legislation passed the Senate on March 1, 2006, the day before the final version of H. R. 3199 was passed. It passed out by a margin of 95-4. Not surprisingly, Russ Feingold was one of the Senators voting against the bill, and he remarked that the legislation was "'deeply flawed.'"[74] The House, by a vote of 280-138, passed the legislation on March 7, 2006. Majority Leader John Boehner still seemed perturbed, remarking "'I found the controversy over this bill the last several years interesting because basically what we did was give law enforcement the same tools they already have to go after the mob and others involved in racketeering.'"[75] Sensenbrenner went even further, declaring "'Intense congressional and public scrutiny has not produced a single substantiated claim that the Patriot Act has been misused to violate Americans' civil liberties.'"[76] Not surprisingly, Dennis Kucinich, a Democrat from Ohio, saw things differently: "'The Patriot Act threatens the civil liberties of every citizen of this nation, and is full frontal assault on the Bill of Rights and our Constitution.'....Mr. Kucinich said the act specifically violates the First, Fourth, Fifth, Eight, and 14th amendments."[77]

The Provisions of the USA Patriot Act Additional Reauthorizing Amendments

Section 1, is as usual, the Short Title, and Section 2 deals with definitions.

The following three Sections (3-5) are very important to the scope of this thesis, because they deal with some of the potentially problematic areas to be discussed in

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[73] The Library of Congress. Thomas. <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:s.02167:>.
[74] Diamond, John. "Senate passes Patriot Act changes." USA Today Mar. 2 2006. Newspaper Source 11 February 2007. <http://search.ebscohost.com>. See page 2.
[75] Hurt, Charles. "House OKs disputed provisions of Patriot Act." Washington Times, The (DC) Mar 8. 2006. Newspaper Source 11 February 2007. <http://search.ebscohost.com>.
[76] Hurt, Charles. See page 2.
[77] Hurt, Charles. See page 2.

Chapter 3. The official titles of these three sections, respectively, are Judicial Review of FISA Orders, Disclosures, and Privacy Protection for Library Patrons. As reported by Doyle and Yeh, this bill seeks to "provide civil liberties safeguards not included in the conference report."[78] These concessions to civil liberties include:

> Recipients of secret court orders to turn over sensitive information on individuals linked to terrorism investigations are not allowed to disclose those orders but can challenge the gag order after a year...Libraries, including those that offer Internet access, would not be required to turn over information without the approval of a judge...Recipients of an FBI 'national security letter'- - an investigator's demand for access to personal or business information- - would not have to tell the FBI if they consult a lawyer.[79]

Summary

The Patriot Act passed easily in 2001. The country was prepared to give the President whatever power was needed in order to ensure that terrorist attacks like the ones that occurred on September 11th would never happen again. However, the Act has had a tumultuous journey since its rapid passage in 2001. Many have decried the Act as violation of civil liberties and rights. Congressional leaders were among those in the chorus, and the clauses which called for certain provisions to sunset forced Congress to review the legislation again. In 2006 alone, two laws were passed as an attempt of addressing perceived problems in the original Act. In addition to both of these pieces of legislation, the House and Senate passed bills which allowed extensions of the sunset provisions while the debate was ongoing, creating Public Laws 109-160[80] and 109-170.[81] These were not comprehensive to merit a separate discussion, but it is useful to mention

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[78] See page 1.
[79] Diamond, John. See page 2.
[80] The Library of Congress. Thomas. <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:s.02167:>.
[81] The Library of Congress. Thomas. <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.04659:>.

them here to further emphasize the controversy that arose in these hearings. The next Chapter will take a look at these possible defects.

Chapter 3

Controversial Sections

Introduction

As discussed previously, not all Sections of the Patriot Act have aroused opposition by Constitutional scholars. However, the purpose of this chapter will be to examine those sections which do present potential problems. Specifically, Sections 203, 206, 213, 215, 216, 218, and 505 will be discussed. The legal literature that will be discussed is merely a small sampling of the material that is available on this subject. However, these journal articles were chosen because they provided excellent substantive information, which will aid in helping understand this legislation. The actual text of the respective Sections is included as footnotes simply because most of them have extreme length. I will also refer briefly to remarks made during a Congressional hearing, as well as to correspondence with a scholar at the First Amendment Center.

Section 203

This provision addresses information sharing among various layers of law enforcement. It has four different subsections, with each providing a barrage of material. Jennifer Evans provides a good summary, saying it "allows law enforcement agencies to share sensitive information gathered in criminal investigations with the CIA, NSA, and

other federal agencies."[78] Evans describes in detail the information sharing that is allowed, but pinpoints Section 203(a) as being of "particular concern," because it "allows law enforcement agencies to provide foreign intelligence and counter-intelligence information that is revealed to a grand jury to federal intelligence agencies without a court order."[79] Section 203 is entitled *Authority to Share Criminal Investigative Information.*[80] Evans goes on to note the importance of secrecy in grand jury proceedings, and reminds readers that not everyone sent to a grand jury is indicted. In

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[78]Evans, Jennifer. See page 982.

[79] Evans, Jennifer. See page 982.

[80] (a) AUTHORITY TO SHARE GRAND JURY INFORMATION.—(1) IN GENERAL.—Rule 6(e)(3)(C) of the Federal Rules of Criminal Procedure is amended to read as follows: ''(C)(i) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—''(I) when so directed by a court preliminarily to or in connection with a judicial proceeding;''(II) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; ''(III) when the disclosure is made by an attorney for the government to another Federal grand jury; ''(IV) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of State criminal law, to an appropriate official of a State or subdivision of a State for the purpose of enforcing such law; or ''(V) when the matters involve foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)), or foreign intelligence information (as defined in clause (iv) of this subparagraph), to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. ''(ii) If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.''(iii) Any Federal official to whom information is disclosed pursuant to clause (i)(V) of this subparagraph may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Within a reasonable time after such disclosure, an attorney for the government shall file under seal a notice with the court stating the fact that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.''(iv) In clause (i)(V) of this subparagraph, the term 'foreign intelligence information' means—''(I) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against—''(aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; ''(bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; or ''(cc) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of foreign power; or ''(II) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to—''(aa) the national defense or the security of the United States; or ''(bb) the conduct of the foreign affairs of the United States.''.(2) CONFORMING AMENDMENT.—Rule 6(e)(3)(D) of the Federal Rules of Criminal Procedure is amended by striking''(e)(3)(C)(i)'' and inserting ''(e)(3)(C)(i)(I)''. (b) AUTHORITY TO SHARE ELECTRONIC, WIRE, AND ORAL INTERCEPTION INFORMATION.—(1) LAW ENFORCEMENT.—Section 2517 of title 18, United States Code, is amended by inserting at the end the following: ''(6) Any investigative or law enforcement officer, or attorney for the Government, who by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived there from, may disclose such contents to any other Federal law enforcement, intelligence, protective, immigration, national defense, or

some ways, this point seems to open the door for possible harassment of innocent citizens. It is feasible to imagine a situation in which someone who is been cleared of a crime by local authorities is then hounded by the FBI or another such organization because of information gleaned from a grand jury hearing. Indeed, as Evans says, the provision "blurs the role of...agencies, which were created for very different purposes. Without appropriate safeguards, blurring or roles could lead to significant abuses of power."[81] This is an important point in this type of discussion, since it could conceivably be argued that one of the functions of the Constitution is to ensure that such abuses of

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national security official to the extent that such contents include foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)), or foreign intelligence information (as defined in subsection (19) of section 2510 of this title), to assist the official who is to receive that information in the performance of his official duties. Any Federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information.".(2) DEFINITION.—Section 2510 of title 18, United States Code, is amended by—(A) in paragraph (17), by striking "and" after the semicolon; (B) in paragraph (18), by striking the period and inserting "; and"; and (C) by inserting at the end the following: "(19) 'foreign intelligence information' means—"(A) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against— "(i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; "(ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; or "(iii) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or "(B) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to—"(i) the national defense or the security of the United States; or "(ii) the conduct of the foreign affairs of the United States.".(c) PROCEDURES.—The Attorney General shall establish procedures for the disclosure of information pursuant to section 2517(6) and Rule 6(e)(3)(C)(i)(V) of the Federal Rules of Criminal Procedure that identifies a United States person, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801)). (d) FOREIGN INTELLIGENCE NFORMATION.— (1) IN GENERAL.— Notwithstanding any other provision of law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties. Any Federal official who receives information pursuant to this provision may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. (2) DEFINITION.—In this subsection, the term "foreign intelligence information" means— (A) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against—(i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (iii) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (B) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to— (i) the national defense or the security of the United States; or (ii) the conduct of the foreign affairs of the United States.

[81] See page 983.

power by the government are not allowed to be carried out. Evans also points that "liberal sharing of information gained through grand jury investigations...circumvents... protections, which have always been an integral part of the criminal justice system."[82] However, it is worthwhile to note that 203 is not one of the more widely criticized Sections. There are a couple potential reasons for this. Critics may felt that a focused attack on the provisions they feel the most egregious would be the best method, and thus have allowed this section to escape condemnation. On the other hand, it may be that Evans is simply being overzealous. Either way, of the articles to be employed in this effort, Evans' is the only one which discusses it.

Section 206

Section 206[83] is entitled *Roving Surveillance Authority under the Foreign Intelligence Surveillance Act of 1978*. As suggested by the name, this provision expands the ability of the government to conduct surveillance under the Foreign Intelligence Surveillance Act of 1978, which was discussed earlier. Jeremy Smith, in no uncertain terms, makes clear his evaluation: "The particularity requirement of the Fourth Amendment requires that the [Supreme] Court void Section 206's authorization of roving wiretaps. Section 206 gives the federal government excessively broad authority to intrude on the privacy of third parties..."[84] Therefore, Smith is not merely questioning the validity of the Congressional action, he is actively calling for a ruling of

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[82] See page 983.

[83] Section 105(c)(2)(B) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1805(c)(2)(B)) is amended by inserting ", or in circumstances where the Court finds that the actions of the target of the application may have the effect of thwarting the identification of a specified person, such other persons," after "specified person".

[84] Smith, Jeremy. "The USA Patriot Act: Violating Reasonable Expectations of Privacy Protected by the Fourth Amendment without Advancing National Security." *North Carolina Law Review* 82 (December 2003) 412-455. See page 421.

unconstitutionality by the Supreme Court. However, as Smith himself acknowledges, the federal government sees this Section in a different light: "Attorney General John Ashcroft has asserted that roving wiretaps do not violate the particularity requirement because the wiretaps have particularity of person."[85] However, as suggested by Smith's strong wording against this Section, some scholars believe the problem lies in the ability of third parties' privacy rights to be manipulated and abused. Apparently Congress heard at least some of these concerns, because, as alluded to previously, greater oversight was provided for the monitoring of this Section during the revision hearings, and it was scheduled to sunset at the conclusion of the year 2009.[86]

Section 213

Section 213,[87] *Authority for Delaying Notice of the Execution of a Warrant*, has drawn widespread outrage from Constitutional scholars. This is the provision which provides for the sneak-and-peek search warrants which were previously alluded to. It allows for searches to be carried out without immediately notifying the individual whose possessions are being searched. Smith points out that this Section provides "broad authority" for the delayed notice, and also he states "Alarmingly, [it] authorizes such

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[85] See page 417

[86] Doyle, Charles and Brian T. Yeh. See page 3

[87] Section 3103a of title 18, United States Code, is amended—(1) by inserting ''(a) IN GENERAL.—'' before ''In addition''; and(2) by adding at the end the following: ''(b) DELAY.—With respect to the issuance of any warrant or court order under this section, or any other rule of law, to search for and seize any property or material that constitutes evidence of a criminal offense in violation of the laws of the United States, any notice required, or that may be required, to be given may be delayed if— ''(1) the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result (as defined in section 2705);''(2) the warrant prohibits the seizure of any tangible property, any wire or electronic communication (as defined in section 2510), or, except as expressly provided in chapter 121, any stored wire or electronic information, except where the court finds reasonable necessity for the seizure; and ''(3) the warrant provides for the giving of such notice within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown.''.

searches not only in terrorist investigations but also in general criminal investigations.[88] Evans also finds this Section objectionable, and provides additional details about how it functions. She points out that, "The court has the authority to delay notice when it finds reasonable cause to delay...The statute does not, however, define reasonable cause..."[89] Because of factors such as these, Evans feels that this Section ultimately violates privacy rights stemming from the Fourth Amendment.[90]

Susan Herman provides further commentary: "Having an opportunity to view the search warrant gives the target a chance to point out any mistakes—perhaps the address is wrong—and to ensure that the search does not exceed the scope authorized."[91] Herman also offers information regarding the use of this tool by law enforcement, saying "The deferred notice authority was used 153 times between enactment and January 31, 2005. Only eighteen of those uses were in terrorism investigations."[92] This is a very important point, since the supposed aim of this legislation was to, in fact, fight terrorism. Also, as discussed in the opening chapter of this thesis, public opinion should have some bearing on this discussion, since the legitimacy of the government depends upon the acquiescence of the citizenry to the laws. In this regard also, Herman has some disconcerting information: "Seventy-one percent of those [Americans] surveyed [by Gallup][93] disapproved of allowing agents to search a home secretly, and for an unspecified period of time, not to inform the person of that search."[94] Therefore, it may seem contradictory that a bill meant to make Americans feel safer could instead potentially make them fear

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[88] See page 435.
[89] See page 973.
[90] See page 974.
[91] Herman, Susan. See page 100.
[92] See page 100.
[93] Saad, Lydia. "Americans Generally Comfortable with Patriot Act." The Gallup Organization. 2004.
[94] See page 101.

the power of law enforcement officers in addition to fearing terrorists. Herman concedes that the conference report from the revision hearings "proposed some time limits", but qualifies this information by claiming "the limits were...elastic and subject to renewal."[95]

Section 215

Section 215 is named *Access to Records and Other Items under the Foreign Intelligence Surveillance Act.* As discussed previously, this was one of the most vastly revised sections during the 2005-06 hearings. That alone should indicate that the public was cognizant of various issues that arose with its use. Herman helps sort through the technical language[96] by describing some of the features made possible by this Section,

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[95] See page 102.

[96] Title V of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861 et seq.) is amended by striking sections 501 through 503 and inserting the following: "SEC. 501. ACCESS TO CERTAIN BUSINESS RECORDS FOR FOREIGN INTELLIGENCE AND INTERNATIONAL TERRORISM INVESTIGATIONS. "(a)(1) The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution. "(2) An investigation conducted under this section shall—"(A) be conducted under guidelines approved by the Attorney General under Executive Order 12333 (or a successor order); and "(B) not be conducted of a United States person solely upon the basis of activities protected by the first amendment to the Constitution of the United States. "(b) Each application under this section— "(1) shall be made to—"(A) a judge of the court established by section 103(a); or "(B) a United States Magistrate Judge under chapter 43 of title 28, United States Code, who is publicly designated by the Chief Justice of the United States to have the power to hear applications and grant orders for the production of tangible things under this section on behalf of a judge of that court; and "(2) shall specify that the records concerned are sought for an authorized investigation conducted in accordance with subsection (a)(2) to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities. "(c)(1) Upon an application made pursuant to this section, the judge shall enter an ex parte order as requested, or as modified, approving the release of records if the judge finds that the application meets the requirements of this section. "(2) An order under this subsection shall not disclose that it is issued for purposes of an investigation described in subsection (a). "(d) No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section. "(e) A person who, in good faith, produces tangible things under an order pursuant to this section shall not be liable to any other person for such production. Such production shall not be deemed to constitute a waiver of any privilege in any other proceeding or context."SEC. 502. CONGRESSIONAL OVERSIGHT. "(a) On a semiannual basis, the Attorney General shall fully inform the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate concerning all requests for the

saying it "authorizes the government to acquire records and tangible things from custodians—including educational or financial institutions, Internet service providers, or even indigent librarians—under a court order."[97] Herman then discusses the main problems that people find with this, saying it "allegedly violates Fourth Amendment principles of antecedent review by not requiring a court to find individualized suspicion before issuing the order," and "the gag order allegedly violates the Fourth Amendment because...it does provide for notice to the target...the potential safeguard of...invok[ing] judicial review of any sort is eliminated."[98] Herman's first point is echoed by Jeremy Smith, who argues that it is "unconstitutional in that it eliminates the reasonable suspicion type standard and extends FISA to 'United States persons' contrary to the purpose of FISA and the spirit of the Fourth Amendment."[99] He also notes that the "automatic access to records based on a certification that they are sought to 'protect against international terrorism or clandestine intelligence activities'" is a "fundamental shift" in the law.[100] Smith, in his writing, seems to be inserting these quotes from the Act in almost sarcastic way, in order to further reiterate his distaste for the provision.

This is an area in which First Amendment concerns also appear, because of the fear of a chilling effect. Paul McMasters, the chief ombudsmen at The First Amendment Center, made clear in e-mail correspondence[101] that he believes the monitoring of library records could create a chilling effect. As discussed previously, a chilling effect is, in

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production of tangible things under section 402. "(b) On a semiannual basis, the Attorney General shall provide to the Committees on the Judiciary of the House of Representatives and the Senate a report setting forth with respect to the preceding 6-month period— "(1) the total number of applications made for orders approving requests for the production of tangible things under section 402; and "(2) the total number of such orders either granted, modified, or denied."

[97] See pages 75-76.

[98] See page 78.

[99] See page 423.

[100] See page 422.

[101] I corresponded with Mr. McMasters via e-mail on December 21st and 22nd, 2006.

essence, any law which unreasonably deters an act that is protected by the First Amendment. In an article written by McMasters, he makes a similar point, saying "Critics charge that government agents can use this power to paw through the library loans or bookstore purchase records of ordinary Americans."[102] This rekindles a point which has been discussed several times in this thesis: many opponents of this Act contend that the legislation was not focused enough on terrorist activity, and this provision certainly falls under that category in their estimation. Herman also provides information about the use of Section 215 in practice, saying "Figures about [its] use...do not provide an accurate gage of how frequently the government has sought records from librarians or other custodians of records...if custodians voluntary turn over requested records, no court order is necessary."[103] In this point, Herman discusses the uses of Section 505, which will be outlined in later pages. In summation, Section 215 is one that has drawn ire from a rather wide range of sources, and is one of the more infamous parts of the Act. Importantly, during the reauthorization hearings, the Congress, just as with Section 206, provided for "greater congressional and judicial oversight" and scheduled it to "sunset at the end of 2009."[104]

Section 216

Section 216 has a lot to do with the monitoring of various electronic communications, such as e-mail. It is entitled *Modification of Authorities Relating to Use of Pen Registers and Trap and Trace Devices.*[105] This does several important things:

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[102]McMasters, Paul. "Patriot Act is Exhibit A on the risk of secrecy." August 17, 2005. 28 December 2006 <www.firstamendmentcenter.org>.
[103] See page 79.
[104] Doyle, Charles and Brian T. Yeh. See page 1.

[105] (a) GENERAL LIMITATIONS.—Section 3121(c) of title 18, United States Code, is amended— (1) by inserting ''or trap and trace device'' after ''pen register''; (2) by inserting '', routing, addressing,'' after ''dialing''; and (3) by striking ''call processing'' and inserting ''the processing and transmitting of wire or electronic communications so as not to include the contents of any wire or electronic communications''. (b) ISSUANCE OF ORDERS.—(1) IN GENERAL.—Section 3123(a) of title 18, United States Code, is amended to read as follows:''(a) IN GENERAL.—''(1) ATTORNEY FOR THE GOVERNMENT.—Upon an application made under section 3122(a)(1), the court shall enter an ex parte order authorizing the installation and use of a pen register or trap and trace device anywhere within the United States, if the court finds that the attorney for the Government has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation. The order, upon service of that order, shall apply to any person or entity providing wire or electronic communication service in the United States whose assistance may facilitate the execution of the order. Whenever such an order is served on any person or entity not specifically named in the order, upon request of such person or entity, the attorney for the Government or law enforcement or investigative officer that is serving the order shall provide written or electronic certification that the order applies to the person or entity being served.''(2) STATE INVESTIGATIVE OR LAW ENFORCEMENT OFFICER.—Upon an application made under section 3122(a)(2), the court shall enter an ex parte order authorizing the installation and use of a pen register or trap and trace device within the jurisdiction of the court, if the court finds that the State law enforcement or investigative officer has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation.''(3)(A) Where the law enforcement agency implementing an ex parte order under this subsection seeks to do so by installing and using its own pen register or trap and trace device on a packet-switched data network of a provider of electronic communication service to the public, the agency shall ensure that a record will be maintained which will identify—''(i) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; ''(ii) the date and time the device was installed, the date and time the device was uninstalled, and the date, time, and duration of each time the device is accessed to obtain information; ''(iii) the configuration of the device at the time of its installation and any subsequent modification thereof; and ''(iv) any information which has been collected by the device. To the extent that the pen register or trap and trace device can be set automatically to record this information electronically, the record shall be maintained electronically throughout the installation and use of such device. ''(B) The record maintained under subparagraph (A) shall be provided ex parte and under seal to the court which entered the ex parte order authorizing the installation and use of the device within 30 days after termination of the order (including any extensions thereof).''.(2) CONTENTS OF ORDER.—Section 3123(b)(1) of title 18,United States Code, is amended—(A) in subparagraph (A)—(i) by inserting ''or other facility'' after ''telephone line''; and (ii) by inserting before the semicolon at the end ''or applied''; and (B) by striking subparagraph (C) and inserting the following: ''(C) the attributes of the communications to which the order applies, including the number or other identifier and, if known, the location of the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied, and, in the case of an order authorizing installation and use of a trap and trace device under subsection (a)(2), the geographic limits of the order; and''.(3) NONDISCLOSURE REQUIREMENTS.—Section 3123(d)(2) of title 18, United States Code, is amended—(A) by inserting ''or other facility'' after ''the line''; and (B) by striking '', or who has been ordered by the court'' and inserting ''or applied, or who is obligated by the order''. (c) DEFINITIONS.— (1) COURT OF COMPETENT JURISDICTION.—Section 3127(2)of title 18, United States Code, is amended by striking subparagraph (A) and inserting the following:''(A) any district court of the United States (including a magistrate judge of such a court) or any United States court of appeals having jurisdiction over the offense being investigated; or''.(2) PEN REGISTER.—Section 3127(3) of title 18, United States Code, is amended— (A) by striking ''electronic or other impulses'' and all that follows through ''is attached'' and inserting ''dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication''; and (B) by inserting ''or process'' after ''device'' each place it appears. (3) TRAP AND TRACE DEVICE.—Section 3127(4) of title 18, United States Code, is amended—(A) by striking ''of an instrument'' and all that follows through the semicolon and inserting ''or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication, provided, however, that such information shall not include the contents of any

"It expanded the definition of a pen register...[and]allows for nationwide pen register orders and creates reporting requirements on the use of government-installed pen registers."[106] Jeremy Smith provides further information about the expanding authority of pen register statutes, saying they "had applied only to telephone information" but that the right of "the federal government to track Internet usage and e-mail communications" was added. However, as Ditzion points out, there are many parts of this provision which do not provide accurate enough definitions to ensure that law enforcement will not have overbroad authority for interpretation. For example, he believes that the language in the Act does not provide enough information about what constitutes "'content' and 'routing.'"[107] As pointed in the article, this is an important difference, because the warrant requirements for actual content are more stringent under the current understanding of the law. Ditzion argues that courts and lawmakers need to clarify this distinction, and he also contends that because "people have a higher expectation of privacy in pen register material on the Internet than is currently provided."[108] Because of this point, one could also possibly view this Section as creating a chilling effect. If people are scared to go about the legal activities they normally would on the internet, then that could constitute a chilling effect. For example, if someone is intimidated by the law and thus is prevented from exercising their Constitutional freedom of speech in e-mail, a chilling effect might be taking place. Ditzion provides excellent commentary in his

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communication;''; and (B) by inserting ''or process'' after ''a device''. (4) CONFORMING AMENDMENT.—Section 3127(1) of title 18, United States Code, is amended—(A) by striking ''and''; and (B) by inserting '', and 'contents' '' after ''electronic communication service''.(5) TECHNICAL AMENDMENT.—Section 3124(d) of title 18, United States Code, is amended by striking ''the terms of''. (6) CONFORMING AMENDMENT.—Section 3124(b) of title 18, United States Code, is amended by inserting ''or other facility'' after ''the appropriate line''.

[106] Ditzion, Robert. See pages 1334-1335.

[107] See page 1335.

[108] See page 1351.

summary, saying "The laws currently governing pen registers, while roughly correct in principle, need to be updated to reflect both the new technical realities and the new societal understandings of privacy."[109] Jeremy Smith also takes issue with this Section, saying it "is unconstitutional on two alternate theories. First, the Fourth Amendment protects all electronic communications...Second...for all practical purposes it is impossible to monitor non-content without violating the privacy of content."[110]

Section 218

Section 218,[111] *Foreign Intelligence Information*, is concerned with a subject similar to that of Section 216. It "expands the power of the government to conduct electronic surveillance instead of proceeding under the more demanding standards...which covers criminal investigations."[112] Herman provides further information, stating that this was:

> A major expansion of the government's authority to conduct surveillance. The government now only needs to persuade the FISA court that there is probable cause to believe that the target is an 'agent of a foreign power,' rather than persuading a regular court that there is probable cause to believe that the target is involved in criminal activity.[113]

Jeremy Smith gives additional insight into this provision, saying, as a result of this Section, "The federal government can obtain a FISA court order absent probable cause when the primary purpose of the surveillance is criminal investigation, provided that

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[109] See page 1352.
[110] See page 441.
[111] Sections 104(a)(7)(B) and section 303(a)(7)(B) (50 U.S.C.1804(a)(7)(B) and 1823(a)(7)(B)) of the Foreign Intelligence Surveillance Act of 1978 are each amended by striking "the purpose" and inserting "a significant purpose".
[112] Herman, Susan. See page 92.
[113] See pages 92-93.

gathering foreign intelligence is a 'significant purpose.'"[114] In other words, Smith seems to imply that the potential for abuse could be potentially very disturbing. Jennifer Evans also comments, writing about this Section "lessening the burden of proof the government must demonstrate in order to obtain a FISA warrant."[115] Susan Herman provides information about the use of this provision: "According to Attorney General Gonzales, the government has submitted seventy-four percent more applications to the FISA court since the Patriot Act was enacted, all of which have been granted."[116] This figure certainly suggests that the court may be reluctant to quash the government's requests.

Herman identifies the "principal Constitutional challenge" to this provision as the idea "that electronic surveillance should not be permitted in the absence of a more traditional judicial finding of probable cause."[117] Smith provides even stronger wording: "Section 218 is not amendable to reform or modification and is unconstitutional."[118] He also remarks, "Courts cannot let section 218 be used to permit warrantless wiretaps in ordinary criminal investigations beyond the scope of terrorist exigency that prompted the wireless wiretaps in the first place."[119] Evans joins the chorus, remarking that, "this amendment allows the FBI to conduct...a wiretap primarily to obtain evidence of a crime without proving probable cause, violating the Fourth Amendment."[120] So, although they all may voice their concerns in slightly different language, the Constitutional scholars referenced here find this provision to be very unsettling.

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[114] See page 424.
[115] See page 972.
[116] See page 94.
[117] See page 93.
[118] See page 435.
[119] See page 435.
[120] See page 975.

Section 505

Section 505[121] is named *Miscellaneous National Security Authorities*. Unlike some of the other provisions which have been discussed, just looking at the title does not give much information as to what is contained therein. This may be a strategic move on the part of Congress, since the authority dealt with here is similar to that of Section 215.

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[121] (a) TELEPHONE TOLL AND TRANSACTIONAL RECORDS.—Section 2709(b) of title 18, United States Code, is amended—(1) in the matter preceding paragraph (1), by inserting "at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director" after "Assistant Director"; (2) in paragraph (1)—(A) by striking "in a position not lower than Deputy Assistant Director"; and (B) by striking "made that" and all that follows and inserting the following: "made that the name, address, length of service, and toll billing records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States; and"; and (3) in paragraph (2)—(A) by striking "in a position not lower than Deputy Assistant Director"; and (B) by striking "made that" and all that follows and inserting the following: "made that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.". (b) FINANCIAL RECORDS.—Section 1114(a)(5)(A) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3414(a)(5)(A)) is amended—(1) by inserting "in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director" after "designee"; and (2) by striking "sought" and all that follows and inserting "sought for foreign counter intelligence purposes to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United Statesperson is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.". (c) CONSUMER REPORTS.—Section 624 of the Fair Credit Reporting Act (15 U.S.C. 1681u) is amended—(1) in subsection (a)—(A) by inserting "in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office designated by the Director" after "designee" the first place it appears; and (B) by striking "in writing that" and all that follows through the end and inserting the following: "in writing, that such information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States."; (2) in subsection (b)—(A) by inserting "in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge of a Bureau field office designated by the Director" after "designee" the first place it appears; and (B) by striking "in writing that" and all that follows through the end and inserting the following: "in writing that such information is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States."; and (3) in subsection (c)—(A) by inserting "in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director" after "designee of the Director"; and (B) by striking "in camera that" and all that follows through "States." and inserting the following: "in camera that the consumer report is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution of the United States.".

Herman declares "It allows the government to obtain records from a communications provider by issuing its own administrative subpoena, called a National Security Letter."[122] Herman further identifies the potential targets, which include "telephone companies, Internet service providers, and libraries with computer terminals."[123] In Herman's critique, she does not seem very fond of this provision, remarking "Section 505 goes even further than Section 215 in circumventing judicial oversight of the government's collection of information from third party custodians."[124] Furthermore, she also notes that Congressional oversight is limited: "The FBI is required to report to Congress twice a year on the use of this authority, but the scope of the obligation is vague and members of Congress complained publicly that the reports were not always submitted properly."[125] This is a somewhat surprising remark, since Congress is the body responsible for the legislation. Therefore, it would likely behoove the FBI to follow the proper protocol, in order to prevent their power from being taken away. Herman provides further information on the power of this Section, saying that it has a "broadly worded" "nondisclosure provision", and that it "dispenses with any showing of individualized suspicion and any form of antecedent judicial review."[126] It is also useful to examine the Congressional debates in 2005, since this was one of the provisions discussed, at least in some in the subcommittee hearings. In fact, Representative Robert Scott, a Congressman from Virginia, voices concerns similar to those raised by Herman. Scott remarks "Records sought under this provision do not have to pertain to a foreign power...thus the

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[122] See page 86.
[123] See page 86.
[124] See page 86.
[125] See page 88.
[126] See page 87.

confidentiality of records can get up in such [National Security] letters."[127] Herman also discusses the court action that has followed this portion of the Act.[128] However, I will save discussion regarding litigation for the next Chapter. It is also worth noting that in a similar fashion to Section 215, Section 505 may present the possibility of a chilling effect.

Summary/Conclusion

Sections 203, 206, 213, 215, 216, 218, and 505 of the initial Patriot Act have drawn widespread criticism from Constitutional scholars. These scholars believe that the aforementioned provisions violate the civil liberties of Americans. Most of the criticism is mounted in terms of the Fourth Amendment, although a much smaller subset of voices complains about First Amendment issues. However, despite such criticisms, the Act received very little modification from the Congress in the reauthorization hearings. Because of the legislative branch's apparent unwillingness to address the issues that concern many scholars and citizens, it appears the judiciary will have an active role in deciding on the Constitutionality of this legislation. For that reason, the following Chapter will examine action that has been taken by the judiciary in relation to this Act specifically. It will also examine more general Court actions around the war on terror, and national security in general.

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[127] United States. Cong. House. Subcommittee on Crime, Terrorism, and Security of the Committee on the Judiciary. Hearing on the Implementation of the USA Patriot Act: Sections 505 and 804. 109th Cong. 2nd sess. Washington: GPO, 2005. 13 September 2006 <http://0-web.lexisnexis.com.umiss.lib.olemiss.edu/>.

[128] See pages 89-91.

Chapter 4

The Judiciary and its Role

Introduction

Although the Patriot Act has met the approval of Congress and the President, it must past muster with the third branch of government before its place in the American system of government is secure. In Chapter 1, I discussed the debate over civil liberties and national security, and which holds more weight. It will be worthwhile to briefly return to that discussion here, since that debate will likely play an important role in the judiciary's consideration of the constitutionality or unconstitutionality of the Patriot Act.

As has been seen throughout this thesis, many lawyers and civil libertarians argue that portions of the Act infringe unnecessarily on the civil liberties of Americans. Whether or not I agree with this point will be discussed in Chapter 5. However, even if it is assumed that the Act does, in fact, intrude upon the rights of citizens of the United States, it remains important to remember even constitutionally guaranteed rights are not absolute. As will be seen in this chapter, the Supreme Court has, in the past, permitted certain exceptions to various rights and liberties in the name of national security. However, at other times the Supreme Court, and lower courts all across the country, have intervened and made clear that the steps undertaken by government in the name of security go too far in violating these rights. Because of the relatively recent passage and enforcement of the Patriot Act, the judicial branch has had few chances to examine cases

related to it. On the broader subject of the war on terrorism generally, there have been a few more opportunities for the judiciary to make rulings. It is worth stopping here to make a very important point: courts are passive institutions. Courts cannot simply address issues or laws they feel are problematic. Instead, they must wait for someone to present the problem by petitioning a court for redress of grievances. This can occur in various ways, but it must happen before they get involved. The following sections will cover a range of cases which have involved national security and civil liberties. They will follow in chronological order, meaning the cases most closely related to the Act and to the war on terror will come at the end of the discussion. The cases which have been chosen for examination have a similar theme: they all relate to national security and civil liberties. The historical cases which are included are identified by case books such as the one written by Epstein and Walker to be among the most important cases in the debate between civil liberties and national securities. Moreover, many include challenges against the government based on the First or Fourth Amendments. Obviously, this is an important point, since it relates back to the original research question.

Schenck v. United States (1919)

Schenck was decided by the United States Supreme Court. Schenck was charged with violating the Espionage Act of 1917, by

> causing and attempting to cause insubordination, &c., in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire... conspiring to commit an offense against the United States, to-wit, to use the mails for the transmission of matter declared to be non-mailable...unlawfully using...the mails for the transmission of the same matter and otherwise as above.[127]

[127] Schenck v. United States, 249 U.S. 47, 1919. 12 Feb. 2007 <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol= 249&invol=47>. See page 1.

Schenck's attorney did not contend the charge that his client had violated this law, but instead argued the Espionage Act was a violation of the First Amendment.[128] In affirming the lower court, and thus upholding Shenck's conviction, Justice Holmes, delivering the opinion of the Court, stated: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any Constitutional right."[129] This opinion, in other words, frankly states that the government may limit constitutional freedoms in times of war. Therefore, it has been clear from an early period that the Court does not regard the guarantees included in the Bill of Rights as absolute.

Abrams v. United States (1919)

This case was decided by the United States Supreme Court. Under the Espionage Act, five men were convicted of "conspiring, when the United States was at war with the Imperial Government of Germany to unlawfully utter, print, write, and publish..." various sentiments against the government of the United States, including deriding the system of government itself, trying to make the government appear disgraceful, and encouraging citizens not to support the war effort.[130] These men were convicted of a lower court on these charges, and they based their appeal to the Supreme Court on First Amendment rights. However, the decisions of guilt were upheld by the Supreme Court:

Thus it is clear not only that some evidence but that much persuasive evidence

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[128] Epstein, Lee and Thomas G. Walker, see page 217.
[129] Schenck, See page 1.
[130] Abrams v. United States, 250 U. S. 616, 1919 15 Jan. 2007 <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=250&invol=616>.

> was before the jury tending to prove that the defendants were guilty as charged in both the third and fourth counts of the indictment and under the long established rule of law hereinbefore stated the judgment of the District Court must be affirmed.

Another important point of the case can be taken from Justice Oliver Wendell Holmes' dissent, in which he states the power of the government to limit speech, "undoubtedly is greater in times of war than in times of war because war opens dangers that do not exist at other times."[131] This statement is important for two reasons. First, Holmes was conceding the power of the government to act, yet still believed it had gone too far. Holmes had written the opinion in *Schenck* not long before this case arose, which clearly demonstrates that he was not a crazed civil libertarian. Second, the type of argument employed here is similar to the ones the government today relies on to justify their actions in regard to limiting civil liberties. However, it is also important to remember that Holmes' opinion does not set precedent. In addition, these men were not citizens, and had not even begun naturalization proceedings, even though they each had been in the United States for a range of 5 to 10 years.

Gitlow v. New York (1925)

The United States Supreme Court was the venue for the decision in *Gitlow*. The laws that Gitlow was charged with violating were New York Penal Code 160 and 161.1.[132] The state indicted him on:

> two counts. The first charged that the defendant had advocated, advised and taught the duty, necessity and propriety of overthrowing and overturning organized government by force, violence and unlawful means, by certain writings...the second that he had printed, published and knowingly circulated and

[131] Abrams. See page 7.
[132] Gitlow v. New York, 268 U.S. 652, 1925. 15 Feb. 2007 <http://caselaw.lp.findlaw.com/scripts/getcase.pl? court=us&vol=268&invol=652>. See page 1.

> distributed a certain paper called 'The Revolutionary Age,' ...advising and teaching the doctrine that organized government should be overthrown by force, violence and unlawful means.[133]

As reported by the Court's opinion, Gitlow was found guilty of these charges in the Supreme Court of New York and the ruling was affirmed both in the "Appellate Division" and the Court of Appeals, leading him to appeal to the Supreme Court.[134] Gitlow's attorney argued that the statutes constituted a violation of his First Amendment right to expression, applied to the states through the Fourteenth Amendment.[135] However, in the ruling, the Justices were not convinced. In upholding Gitlow's conviction, the Court concluded:

> It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.[136]

Therefore, this case provides yet another example of the Court ruling against individual freedoms in the name of national security. Epstein and Walker, in their analysis of the opinion, conclude that the effect on civil liberties "is somewhat mixed" because the ruling "expanded constitutional guarantees for freedom of expression" by "apply[ing them] to state and local governments" but it "also limited personal freedom."[137] This is a very valid point, but the important point here is that a man was found guilty by the Court, not for carrying out an action, but for advocating one.

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[133] Gitlow. See page 2.
[134] See page 1.
[135] Gitlow. See page 4.
[136] See page 4.
[137] See page 227.

Toyosaburo Korematsu v. United States (1944)

This is yet another case in which the Supreme Court issued a very important ruling. Korematsu was arrested for refusal to follow an edict calling for him to leave his home on the West Coast and go to an internment camp.[138] In Justice Black's opinion, he makes clear that the rationale for doing so is national security: "We are at war with the Japanese Empire...military authorities feared an invasion of our West Coast... the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast."[139] Therefore, the Court justified making people leave their homes based solely on their ethnicity. From this case, it can be seen with great clarity that the Court has, in the past, allowed for the civil liberties of citizens to be limited in the name of national safety. In addition, this decision singled out a group merely for their ethnicity. Therefore, it is possible to imagine citizens being punished merely because of religious affiliation. Justices are supposed to be immune from public pressure, but it would certainly seem that they gave in to public hysteria in issuing this ruling.

Dennis v. United States (1951)

Dennis provides another Supreme Court decision relating to civil liberties and national security. The petitioners were indicted and found guilty in federal district court for violating the Smith Act, by:

> conspiring (1) to organize as the Communist Party a group of persons to teach and advocate the overthrow and destruction of the Government of the United States by

[138] Toyosaburo Korematsu v. United States, 323 U.S. 214, 1944. 17 Jan. 2007 <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=323&invol=214>. See page 1.
[139] Dennis v. United States. 323 U.S. 214, 1951. 15 Feb. 2007 < http://caselaw.lp.findlaw.com /scripts/getcase.pl?court=us&vol=341&invol=494>. See page 5.

> force and violence, and (2) knowingly and willfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence.[140]

In addition, their convictions were upheld by the Court of Appeals.[141] According to the Court, the appeal argued that the Smith Act presented a violation of the freedom of speech guaranteed in the First Amendment, and that the Act's indefiniteness violated the First and Fifth Amendments.[142] However, the justices flatly rejected this rationale:

> Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech...Their conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a "clear and present danger" of an attempt to overthrow the Government by force and violence. They were properly and constitutionally convicted for violation of the Smith Act.[143]

As noted by Epstein and Walker, this was a very important opinion, because "*Dennis* served as a benchmark in other areas of the law in which the federal government asked the Court for sweeping powers to investigate the Communist Party, other subversive groups, and their alleged adherents."[144] This point should immediately bring to mind many of the acts currently being undertaken with the USA Patriot Act. It is true that terrorists are not the same as members of a political party. However, this ruling presents a clear endorsement by the Court that certain groups can be given extra attention for their political beliefs, especially if those beliefs advocate a violent overthrow of the government. Therefore, it is conceivable to imagine the Court allowing some restrictions on the civil liberties of perceived terrorists.

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[140] Dennis. See page 1.
[141] Dennis. See page 1.
[142] See page 1.
[143] See pages 7-11.
[144] See page 241.

Humanitarian Law Project v. John Ashcroft (2004)

The United States District Court for the Central District of California was the location for this legal challenge. The reason including this non-Supreme Court case is simple; the Supreme Court has yet to react to the USA Patriot Act. This suit deals with Section 805 of the Patriot Act, which was not discussed by any of the law journal articles that were reviewed in Chapter 3. Along with Sections 302 and 303 of the Antiterrorism and Effective Death Penalty Act, Section 805 "prohibit[s] the provision of material support, including 'expert advice or assistance,' to designated foreign terrorist organizations."[145] Although this case does not include one of the sections discussed in Chapter 3, it is an important case to review, since the plaintiffs' argument centered on an argument of violation of First and Fifth Amendment rights. The plaintiffs sued because they sought, through a request for summary judgment, to be allowed "to provide support to the lawful, nonviolent activities" of groups that had previously been designated as terrorist organizations.[146] The government sought to have the case dismissed "for lack of justiciability", an argument which Judge Audrey Collins flatly rejected.[147] After dispensing of that legal matter, Judge Collins focused upon the substantive nature of the plaintiffs' challenge, saying:

> First, they argue that the prohibition on providing expert advice and assistance is both impermissibly vague and substantially overbroad. Second, they contend that prohibition violates the First and Fifth Amendments by criminalizing associational speech without proof of intent to incite imminent violence or to support a group's illegal ends. Finally, they assert that the prohibition on providing expert advice and assistance violates the First and Fifth Amendments

[145] Humanitarian Law Project v. John Ashcroft, 309 F. Supp. 2d 1185, 2004. 2 Feb. 2007 <http://0-web.lexis-nexis.com.umiss.lib.olemiss.edu/>. See page 1.
[146] See page 3.
[147] See pages 8-9.

because it grants the Secretary of State unreviewable authority to designate groups as foreign terrorist organizations.[148]

Collins, in recognizing the rights given to citizens by the First Amendment, agreed that the language was too vague.[149] Collins ruled against the plaintiffs in regard to the remaining arguments[150] However, this remained somewhat of a victory for civil libertarians, because it was the first time any portion of the Patriot Act was found to be unconstitutional.

Hamdi v. Rumsfield (2004)

The Supreme Court was the venue for this case. They received the case on appeal from the Fourth Circuit.[151] The petitioner, Yesar Esam Hamdi, an American citizen born in Louisiana, was designated as an "'enemy combatant'" for "allegedly taking up arms with the Taliban."[152] Hamdi's father sued on his behalf, alleging that the government was in violation of, among things, the Fifth and Fourteenth Amendments.[153] Because of this label, "The government contends...holding him in the United States indefinitely—without formal charges or proceedings--unless and until it makes the determination that access to counsel or further process is warranted.[154] The lower court had ruled against Hamdi. They had reached this conclusion partly because of a resolution passed by Congress, the Authorization for Use of Military Force, which called for the President to

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[148] See page 13.
[149] See pages 14-16.
[150] See pages 14-19.
[151] Hamdi v. Rumsfield, 542 U. S. 507, 2004. 9 November 2006 <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=542&invol=507>. See page 6.
[152] See page 1.
[153] See page 1.
[154] See page 3.

use "'all necessary and appropriate force'" in stopping terrorism.[155] However, the justices of the Supreme Court felt differently, concluding "The threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator."[156] Therefore, the Court made clear that it is unwilling to give the administration a complete blank check.

Rasul v. Bush (2004)

The Supreme Court received this case on appeal from the District Court for the District of Columbia and the Court of Appeals; both of these courts had ruled against the petitioners.[157] The petitioners were "2 Australians and 12 Kuwaitis captured abroad" during the United States engagement in Afghanistan.[158] The Supreme Court's summary of the prior court action states:

> Petitioners filed suits under federal law challenging the legality of their detention, alleging that they had never been combatants against the United States or engaged in terrorist acts, and that they have never been charged with wrongdoing, permitted to consult counsel, or provided access to courts or other tribunals. The District Court construed the suits as habeas petitions and dismissed them for want of jurisdiction.[159]

The key issue, obviously, was whether or not district courts have jurisdiction over the habeas corpus petitions filed by detainees at Guantanamo Bay. The Supreme Court disagreed with the interpretation by the lower courts: "United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals

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[155] See pages 3-6.
[156] See page 15.
[157] Rasul v. Bush, 542 U.S. 466, 2004. 15 Nov. 2006 <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=542&invol=466>. See page 4.
[158] Rasul. See page 1.
[159] See page 1.

captured abroad in connection with hostilities and incarcerated at Guantanamo Bay."[160] The confusion about jurisdiction raises a worthwhile idea to consider in regard to much of the anti-terror legislation: the government has not really found itself with this type of issue on its hands before. As suggested by the lower courts' rulings in this case, there is potential for uncertainty in the judiciary about their proper role. If this continues to prove true in the future, it will likely be left for the Supreme Court to decide.

Doe v. Ashcroft (2004)

Doe v. Ashcroft is a case that was heard in the United States District Court for the Southern District of New York. As with the lower court case that was included earlier, this is a worthwhile inclusion because it discussed the USA Patriot Act. The lead plaintiff was "an internet access firm that received an NSL."[161] The Court's analysis, provided by Judge Victor Marrero, also states "Doe has not complied with the NSL request, and has instead engaged counsel to bring the present lawsuit."[162] The plaintiffs argued that the "broad subpoena power violates the First, Fourth, and Fifth Amendments of the United States Constitution, and that the non-disclosure provision violates the Fifth Amendment."[163] Judge Marrero ruled Section 505 of the USA Patriot Act to be unconstitutional:

> The Court concludes that § 2709 violates the Fourth Amendment because, at least as currently applied, it effectively bars or substantially deters any judicial challenge to the propriety of an NSL request. In the Court's view, ready availability of judicial process to purse such a challenge is necessary to vindicate important rights guaranteed by the Constitution or by statute. On separate grounds, the Court also concludes that the permanent ban on disclosure...operates

[160] See page 1.
[161] Doe v. Ashcroft, 334 F. Supp. 2d 471, 2004. 25 October 2006 <http://0-web.lexis-nexis.com.umiss.lib.olemiss.edu>. See page 3.
[162] See page 7.
[163] Doe v. Ashcroft. See page 3.

> as an unconstitutional prior restraint on speech in violation of the First Amendment.[164]

As can be seen from the text above, Marrero's ruling actually refers to 18 U. S. C. § 2709, but this was amended by Section 505, and it is partly these changes which are being protested. Although his finding was later vacated and remanded by the United States Court of Appeals for the Second Circuit in 2006 (this will be discussed later), it is still certainly worthwhile to review the reasoning underlying the decision-making here, as it may come up again in the future. As stated in the opinion, "In short, the Patriot Act removed the previous requirement that § 2709 inquiries have a nexus to a foreign power, replacing that prerequisite with a broad standard of relevance to investigations of terrorism or clandestine intelligence activities."[165] If the arguments employed in Marrero's opinion sound familiar after reading Chapter 3, they most certainly should. Some of the points made in this ruling are identical to the ones that were being made in law journals. However, as will be discussed shortly, the Patriot Act Reauthorization may well have rendered moot the second of Marrero's points in his ruling. The judge also provides powerful language regarding the debate between civil liberties and national security, remaking that:

> Cases engendering intense passions and urgencies to unencumber the government, enabling it to move in secrecy to a given end with the most expedient dispatch and versatile means, often poses the greatest threats to civil liberties...Times like these...demand heightened vigilance, especially by the judiciary, to ensure that, as a people and a nation, we steer a principled course faithful and true to our still-honored founding values."[166]

Remember here, that this is not information coming from an impassioned civil libertarian; instead, it comes from an opinion written by a federal magistrate.

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[164] See page 3.
[165] 334 F. Supp. 2d 471; 2004 U. S. Dist. Lexis 19343, See page 13.
[166] See page 6.

Doe I, et al. v. Gonzales (2006)

This case, which was heard in the United States Court of Appeals for the Second Circuit, is the result of the government's appeal of the ruling made in *Doe v. Ashcroft*. The arguments were heard on November 2, 2005, and a decision was reached on May 23, 2006. The alert reader will no doubt notice that the Patriot Act Reauthorization was passed during the period between argument and decision. Because of this, the Court "issued an order on March 15, 2006 requesting supplemental letter briefs from the parties on the impact of the Reauthorization Act on this case."[167] As reported by the court, "Doe I no longer presses Fourth Amendment claims on this appeal...Therefore, we deem them abandoned."[168] However, the Court reveals that Doe I still believes that the First Amendment is violated in the form of prior restraint, despite the government's assertions to the contrary.[169] The Court felt that they would not be "prudent to resolve these novel First Amendment issues as a part of this appeal," and sent it back to the Southern District of New York.[170] While the Court does concede that the Revision Act modified the gag provision, it stops short of giving it the stamp of constitutionality.[171] This move is not surprising considering the changes that had taken place since the initial ruling by the Southern District. In fact, if Doe had still chosen to pursue the Fourth Amendment challenge, it seems very likely that that portion of the case would have been remanded to the original court as well.

In the concurring opinion, written by Circuit Judge Cardamone, an interesting

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[167] John Doe I, John Doe II, ACLU v. Alberto Gonzales; Docket Nos. 05-0570-cv(L),0-5-4896-cv(CON); 2006. 14 Feb. 2007 <http://0-web.lexis-nexis.com/umiss.lib.olmiss.edu/>. See page 4.
[168] See page 5.
[169] See page 6.
[170] See pages 6-7.
[171] See page 6.

point is brought forward, which may give some suggestion as to future actions planned by the government. Cardamone writes "The government perseveres, insisting that a permanent ban on speech is permissible under the First Amendment. This issue warrants comment, especially because I suspect that a perpetual gag...may likely be unconstitutional."[172] According to Cardamone, the government seeks this perpetual gag because, in essence, they believe that all terrorism investigations are ongoing forever.[173] The concluding remarks in this concurrence gives a strong hint about which way this judge would vote if the issue were to come before this court again: "Although I concur in the per curiam that declines to resolve the novel First Amendment issue before us...that does not mean I think that issue unworthy of comment. Hence, this concurrence." [174] Judging by the tone of the commentary that precedes this statement, it seems to me that it is quite possible Cardamone would have liked to vote against the government, but decided to wait for the case to be brought again, thus allowing for the proper judicial channels to be followed.

Hamdan v. Rumsfield (2006)

The Supreme Court provided the decision in this case. According to the facts of the case, Hamdan, a Yemeni national, was being held at Guantanamo Bay, Cuba, after being charged with "conspiracy 'to commit... offenses triable by military commission."'[175] According to the Court,

In habeas and mandamus petitions, Hamdan asserted that the military commission

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[172] See page 11.
[173] See pages 12-13
[174] See page 14.
[175] Hamdan v. Rumsfield, 000 U.S. 05-184,2006. 17 Nov. 2006 <http://caselaw.lp.findlaw.com/scripts /getcase.pl?court=us&vol=000&invol=05-184>. See page 1.

> lacks authority to try him because (1) neither congressional Act nor the common law of war supports trial by this commission for conspiracy, an offense that, Hamdan says, is not a violation of the law of war; and (2) the procedures adopted to try him violate basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.[176]

The District Court agreed with Hamdan's argument, but the Court of Appeals for the District of Columbia reversed this decision.[177] In their ruling, the Supreme Court issued a stinging rebuke to the Bush administration. Among other things, the opinion held that the aforementioned military commission "is not expressly justified by any Congressional act" and "lacks the power to proceed because its structure and procedures violate both the CMJ and the four Geneva conventions signed in 1949."[178] This opinion is such a big blow to the Bush administration because it continued the trend the Court is currently displaying of showing little leniency toward restricting the rights of detainees.

Humanitarian Law Project v. United States Department of Treasury (2006)

This case presented another opportunity for the United States District Court for the Central District of California to rule on an aspect of the war on terrorism. The plaintiffs were the same group that had provided a challenge in this court in 2004. As identified by Judge Audrey Collins' opinion, their complaint was multi-faceted:

> Plaintiffs challenge five aspects of the EO and its accompanying Regulations. First, they contend that the EO's ban on "services" is unconstitutionally vague because it fails to adequately notify the public, and Plaintiffs specifically, of the conduct to which the ban applies. Furthermore, they argue that the ban on "services" is overbroad because it encompasses a substantial amount of protected speech. Second, they assert that the EO Regulations are vague because they contain no definition of the term "specially designated terrorist group," thereby giving the President unfettered discretion to designate which individuals and

[176] See page 1.
[177] 000 U.S. 05-184. See page 1.
[178] See pages 2-3

> groups fit within that term. Third, Plaintiffs contends that the President's designation authority, as exercised in the EO itself and as distinct from the designation authority delegated to the secretary of treasury, is unconstitutionally vague. Fourth, Plaintiffs contend that the EO's ban on being "otherwise associated with" a terrorist group is vague and overbroad, as it punishes individuals and groups for exercising their First Amendment right to freedom of association. Fifth, Plaintiffs maintain that the Regulations' licensing provision violates the First and Fifth Amendments because it contains no substantive or procedural safeguards for determining which individuals or groups qualify for a license. As such, according to Plaintiffs, the licensing provision gives authorities unfettered discretion to grant or deny a license.[179]

Judge Audrey Collins ruled in favor of the government in regard to the argument that the order used the term services too vaguely, concluding that it passes musters both facially[180] and as applied.[181] Collins also ruled that "services" was not overbroad, [182] and that "Plaintiffs' challenge to the EO's use of the term 'specially designated terrorist group' lacks merit."[183] Although she did not find the term to be unconstitutional, she did find the vague nature of the President's ability to designate groups as such to be unacceptable.[184] She also ruled that the language forbidding organizations from being "'otherwise associated with' an SDGT'" unconstitutional on its face.[185] Moreover, Collins found this provision to be overbroad.[186] Finally, Collins declined to rule on the merits of a challenge to the Office of Foreign Assets Control licensing power, ruling the plaintiffs' did not have standing to sue.[187] The decision was a split victory, as both sides had some of their arguments upheld. Because this is the second case discussed in the thesis in which Judge Collins presided, it is worth considering her personal history. The

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[179] Humanitarian Law Project v. United States Department of Treasury, 2006 U.S. Dist. LEXIS 87753, 2006. 1 Feb. 2007 <http://0-web.lexis-nexis.com.umiss.lib.olemiss.edu/>. See page 6.
[180] See pages 10-13.
[181] See pages 7-10.
[182] See pages 13-14.
[183] See page 14. For a full discussion of the rationale for this decision, see also page 15-16.
[184] See page 16.
[185] See page 19.
[186] See page 20.
[187] See page 21.

judge is "A former Los Angeles prosecutor nominated to the federal bench in 1994 by President Clinton."[188] Therefore, although she was appointed by a Democrat, it is highly unlikely that she is merely a liberal jurist seeking to blunt a conservative President.

Summary/Conclusion

As can be seen from the preceding discussion, the Supreme Court and the rest of the federal court system has a varied history in weighing national securities and civil liberties. The Supreme Court has made explicitly clear that the rights guaranteed in the Constitution are not absolute, especially when the country is at war. Specifically, the Court has often endorsed the limiting of First Amendment rights. However, the justices have also been sure to note that the government is not given a blank check. The Fourth Amendment picture is much less clear, and it is possible that the future battles over the Patriot Act may provide some clarity in this regard. The lower courts have already provided several rulings on the Patriot Act, and have identified possible flaws in the legislation. If these decisions continue on their way throughout the court system, it will be left to the Supreme Court to ultimately decide whether or not the perceived intrusions on the rights of citizens are justified. The Court has been largely unsympathetic to the government's arguments recently in regard to the war on terror. It is also worth pointing out what exactly I have meant when I have referred to the continued challenges which are likely to occur in regard to the USA Patriot Act. It would be highly unorthodox for a party in a suit to challenge the entirety of the Act in one lawsuit, or even all of the provisions that they contend are indefensible. It will be

[188] Seper, Jerry. See page 2.

much more likely for certain Sections to be challenged individually, and some of these lawsuits have already begun their journey. Judging by the agitation of many civil libertarians, it is likely such suits will continue. As promised at the outset, the following chapter will attempt to predict what the courts actually will do, and I will also comment on what I believe they ought to do.

Chapter 5

Analysis

Introduction

The point of undertaking any study of this nature is to find answers to the question posed. At the beginning of this study, I identified a research question that would frame the endeavor undertaken: "Does the USA Patriot Act exceed the need for enhanced national security by violating the 1st and 4th Amendments to the United States Constitution?" I have concluded that portions of the USA Patriot Act, may, in fact, violate the constitutionally guaranteed rights of citizens of this fine country.

I will provide my reasoning shortly, but I must first make a few comments about my reasoning. To begin with, I do not mean this conclusion to be interpreted as an attack on the Congress or the President. Our governmental leaders have been confronted with an unusually difficult problem, and I certainly do not envy them. Moreover, the Act which they worked in concert to produce, and passed very rapidly, included only a handful of questionable provisions. In the following pages, I will lay out my opinions on each of the Sections, and provide predictions about what type of action I believe the courts are likely to take in regard to each. As will be seen, I agree with legal scholars on some provisions, and disagree on others. Before beginning that analysis, it is important to frame the composition of the current United States Supreme Court and the ideology of its members.

The Supreme Court

The Supreme Court is made up of nine justices who serve lifetime appointments. President George W. Bush has had the opportunity to mold the Court, with two appointees during his term. In addition, as will be discussed momentarily, Bush may well get the chance for further tinkering. This is an important point to make, because as been hammered home numerous times in this discussion, the Bush administration had a vital hand in the formation of the USA Patriot Act. The current nine justices, in order of seniority, staring with the Chief Justice, are: John Roberts, John Paul Stevens, Antonin Scalia, Anthony Kennedy, David Souter, Clarence Thomas, Ruth Bader Ginsburg, Stephen Breyer, and Samuel Alito. Alito and Roberts were both nominated by President George W. Bush. In addition, Thomas and Souter were nominated by his father, President George H. W. Bush. Ginsburg and Breyer are the only two current Justices nominated by a Democratic President.[190]

The point is that Republican appointed Justices make up a large majority of the current Court. Stevens was born in 1920,[191] and there is at least some chance that Bush will have the opportunity to appoint another Justice because of Stevens' age. I would certainly suggest that Bush is more conservative than Gerald Ford was. However, Bush would have to contend with a Democratic Congress, rather than the Republican Congress he had with the two previous nominations. Whether or not Bush gets that opportunity, it is readily apparent that this is a conservative court. I draw this conclusion from the well-established idea that the Republican Party is largely composed of individuals leaning toward conservative beliefs, while the members of the Democratic Party often slant

[190] "The Justices of the Supreme Court." Supreme Court of the United States website. <http://www.supremecourtus.gov/about/biographiescurrent.pdf>. See pages 1-3.
[191] "The Justices of the Supreme Court." See page 1.

toward liberal ideologies. Therefore, it seems likely that Presidents of each party would strive to nominate justices with ideologies similar to that of their respective parties. To many, this may suggest that the Court will provide a rubber stamp to the provisions of the Patriot Act. However, the Court may not be as conservative as it would appear to be. Party affiliation is not always an accurate predictor of ideology. This is a fairly basic axiom in political discourse: not every member of a party shares the exact same beliefs. In addition, judging by some of the decisions I have discussed, the Court is unlikely to give the Congress and the President a blank check in the war on terror. The Court that has made these rulings was made up of a group of justices sharing an ideology similar to that of the current one. While it was true that George W. Bush has subsequently replaced two of these justices, Rehnquist and O' Connor, these two would hardly be considered liberal. On the other hand, it is also improbable that the current Court will also wildly liberal rulings. In the following pages, I will predict their reaction to the Sections discussed in Chapter 3.

Section 203

Section 203, as readers will recall, deals with information sharing among various law enforcement organizations. As mentioned when initially discussing this Section, only one of the articles I referenced in this study took issue with this Section. Many of the more flawed provisions drew numerous critics. While this, by itself, is not enough to ensure the constitutionality of this provision, it certainly makes me look at it with much greater scrutiny. After studying the provision, and reviewing Evans' article, I believe the requirements contained in this portion of the Act are reasonable, and will be upheld if

they are challenged in court. Even if a lower court rules against this provision, it is highly unlikely that the Supreme Court would allow such a decision to stand. While it terms of pure constitutionality this idea may seem suspect, the need for national security in times of war seems likely to outweigh the individual liberties that are sacrificed here. It certainly provides much less of an encumbrance to civil liberties than previous laws which were upheld by the Supreme Court, in cases such as *Dennis* and *Korematsu*. As long as law enforcement does not abuse the power given here, this Section will likely endure any legal challenge.

Section 206

Section 206 deals with roving surveillance authority under FISA. It is much more problematic than Section 203, but, as with Section 203, there are not many voices clamoring to criticize it. Moreover, it was amended during the revision hearings. The particularity requirement argument introduced by Jeremy Smith is simply not strong enough to mark unconstitutionality. In fact, I agree with the government's argument in this regard, which is that the particularity of person is maintained in regard to the wiretaps. For this reason, if challenged, the provision is unlikely to be found problematic by the federal judiciary. However, this status could be changed if the sunset provisions are removed without suitable analysis. The sunset condition is a very essential addition, because it ensures that the Congress will monitor the use of this law. Through this monitoring, they can ensure that the particularity requirement is not being violated. The mere presence of oversight is also important, because, through checks and balances, it helps to ensure that the executive branch does not overreach in carrying out its duties,

thus fulfilling a valued Constitutional hallmark.

Section 213

Section 213 is likely unconstitutional. As discussed in Chapter 3, the idea of "sneak and peek" violates the Constitutional right protecting citizens against unreasonable searches and seizures which is contained in the Fourth Amendment. It seems only a matter of time before challenge is brought to this law, and judges are improbable to find a legal rationale for allowing this continue. The argument for national security is simply not strong enough here. The ruling in *Korematsu* comes the closest to providing a legally defensible reason for this provision. However, even the extreme limiting of rights that occurred in that case were limited to one subset of society, rather than the American people in general. National security is certainly important, and that has been discussed numerous times in this thesis. However, governmental actions such as this one make the United States move in the direction of a socialist-type government. Moreover, in my opinion, taking steps this extreme gives the terrorists a victory, because they seek to upset the way of life enjoyed in this country. I find this Section very disturbing, and, as mentioned in Chapter 3, I am joined by a large majority of Americans, and lots of legal scholars. It is difficult to envision it surviving the court system in our democratic society, and I predict it will not.

Section 215

Section 215 provides for governmental access to a wide variety or personal records or private American citizens. In so doing, it almost certainly violates the First and

Fourth Amendments. It clearly has the potential to create a chilling effect on the right of citizens to self-expression. Throughout Chapter 4, numerous cases were discussed which involved the limiting of First Amendment rights. However, abuse this excessive must not be tolerated. Also galling is the language which basically lowers the privacy rights of average Americans to the lower level of privacy reserved for foreign nationals. In researching this Act, I was astonished by the folly of the Congress in passing such a provision. Considering the nature of this study (i.e., continually searching for terms such as "terror") I even feared that the government might serve the campus library with a warrant. While the preceding sentence is somewhat tongue-in-cheek, this provision would allow for such an occurrence to take place. Again, I must reiterate the point made in the previous page: National security is important, but helping terrorists attain their goals does not dissuade them from their mission. This provision is unlikely to meet the standard necessary to pass muster under judicial scrutiny.

Section 216

Section 216 concerns governmental monitoring of electronic communications, such as websites accessed and e-mail. It is quite conceivably unconstitutional because of the vague language contained therein regarding content. I agree with Robert Ditzion's analysis, which argues that people have higher expectations of privacy with internet content than with phone communications. I know of very few Americans who expect their e-mail to be monitored by the government. However, the vague language in this Section certainly opens the door for overzealous law enforcement authorities to do that very thing. In chapter 4, it was demonstrated that lower courts have already struck down

certain provisions of the Patriot Act on vagueness grounds. In addition, Jeremy Smith is correct in asserting that the privacy and Fourth Amendment rights of Americans are violated. The argument for unconstitutionality is strong here, through the First and Fourth Amendment arguments presented. The Supreme Court would likely rule against this provision provided it is challenged.

Section 218

Section 218 allows for the government to seek court orders from FISA which allow for surveillance, rather than a normal court. The provision does not appear to achieve Constitutional merit, because it does not allow a true form of judicial review to take place. By allowing approval to go through the FISA court, the Congress erred greatly. I agree with the scholars' assertion that the Fourth Amendment is violated in this process, because there is a lack of true probable cause requirements. However, I do not believe the federal judiciary will ultimately overturn this Section if it is challenged. It may not be upheld at the lower levels, but the Supreme Court would likely overturn any such decision. Although the Court has shown its willingness to rule against certain aspects of the war on terror, the rights violated here are not as fundamental as in cases such as *Rasul* and *Hamdan*. The violation of rights is also not as excessive as some of the previous Sections which I have predicted will be overturned. In short, this Section provides a close call. In fact, it seems to me that no firm doctrine exists regarding this type of surveillance. It is when all are other factors are equal that it logically follows that ideology will be the deciding factor in the decision. Conservatives traditionally place a large amount of value on public safety and national defense. Legal rationale could be

provided for either side, and enhanced need for national security certainly qualifies as a defensible argument. In this instance, a Supreme Court which is composed largely of conservatives will probably reject any challenges to this provision.

Section 505

Section 505 deals with access to private records, in a fashion similar to Section 215. Along with Section 215, this is the most egregious provision of the Patriot Act. In fact, as suggested by the scholars referenced in Chapter 3, it presents even more daunting problems than Section 215. It has a great potential to produce a chilling effect in violation of the First Amendment, and unreasonably reduces the role of the judicial branch's oversight powers. Instead, by placing great power in the hands of the FBI, it severely upsets the balance of power intended in the Constitution. This power is further driven home by the practice of the law: as discussed in Chapter 3, the FBI often has not followed the correct reporting procedures. Given these facts, it is highly improbable that the Supreme Court would allow the law to stand as currently applied. At the very least, the Court may enter an order requiring that the oversight requirements be properly followed. However, it is far more likely that the Court will react against the intrusions of the judicial branch's power. In so doing, they would be following their own precedent from *Rasul*, which asserted the judiciary branch's right to be involved in decisions regarding the war on terror, over the executive branch's objections. This would not be a surprising decision, because, regardless of ideology, the justices of the Court are aware that the Supreme Court is the head of the judiciary branch. If they willingly cede the third branch's power, they are also giving up their own power.

Summary Conclusions

Sections 203 and 206, though far from perfect, are allowable under the current conditions this nation faces. This would likely not be the case if the country was not in a worldwide war, but that is beside the point. Sections 213, 215, 216, 218, and 505 cannot be wholeheartedly defended with knowledge of the various mandates provided in the Constitution, and with the legal decisions reached in previous cases. The arguments against some, especially 213, 215, and 505, are stronger than others. Unfortunately, some of the others provide a less clear picture, which allows for some judicial discretion. It is imperative that the third branch embrace its role, and ensure that this law is not allowed to continue in its current form. I emphasize the importance of role, because sometimes the justices get too caught up in partisan politics, which greatly threatens our system of government. As previously discussed, the Justices of the Supreme Court are supposed to be immune from political pressures and affiliations. In this instance, they must be. Advocates of national security may try to argue that extreme measures must be taken, on the rationale that even one terrorist attack can cause widespread damage. I would concur wholeheartedly on the second point. However, it is imperative to remember what this nation stands for, and what the soldiers who fight everyday are indeed protecting. It is very commonplace to hear speeches in which politicians praise the troops for "Fighting to defend our freedom." The point is this: They are fighting hard to defend freedoms, so why would we want our own government to undercut them with foolish and unnecessary measures?

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